TRANSCRIPT OF PROCEEDINGS

IN THE MATTER OF:)
)
PROPOSED AMENDMENTS TO THE)
FEDERAL RULES OF CIVIL)
PROCEDURE)

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ADMINISTRATIVE OFFICE OF THE U.S. COURTS

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PROCEDURE)

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Washington, D.C.

Monday,
October 16, 2023

The parties met remotely, pursuant to the notice, at 9:33 a.m.

COMMITTEE MEMBERS AND STAFF:

HON. ROBIN L. ROSENBERG, Chair
PROF. RICHARD L. MARCUS, Reporter
PROF. ANDREW D. BRADT, Associate Reporter
HON. JOHN D. BATES
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HON. M. HANNAH LAUCK
JOSEPH M. SELLERS, ESQ.
ARIANA J. TADLER, ESQ.
HELEN E. WITT, ESQ.
PROF. EDWARD H. COOPER
CARMELITA R. SHINN, ESQ.

WITNESSES TESTIFYING:

ROBERT KEELING
DOUGLAS MCNAMARA
MARY MASSARON
ALEX DAHL
KASPAR STOFFELMAYR
JOHN BEISNER (Virtual)
JONATHAN REDGRAVE (Virtual)
CHRISTOPHER CAMPBELL

WITNESSES TESTIFYING: (Cont'd.)

JAMES SHEPHERD
CHRISTOPHER GUTH
FRED HASTON
MARKHAM LEVENTHAL
AMY KELLER
LANA OLSON
AMY LARSON
JOHN GUTTMAN
GREGORY HALPERIN
HARLEY RATLIFF
JOHN ROSENTHAL
SHERMAN JOYCE
DEIRDRE KOLE
LEIGH O'DELL

P R O C E E D I N G S

(9:33 a.m.)

CHAIR ROSENBERG: Good morning, everyone. It's wonderful to see everyone here. Welcome and thank you to all of the Committee members, the witnesses, and the observers who are here in attendance both in person and virtually. Whether you are here in person or joining us remotely, we do appreciate your participation in the rulemaking process.

Today is the first of three scheduled public hearings on the proposed amendments to the Federal Rules of Civil Procedure. The current published proposals out for public comment include the proposed privilege log amendments, Rules 26 and 16, and the proposed new rule on MDL proceedings, Rule 16.1. We do look forward to hearing your testimony on these proposed amendments and the new rule.

Each witness's formal testimony will be limited to five minutes, followed by five minutes of questions from the Committee. Times on the schedule are approximate and may be adjusted as needed. A signal will be given when there is one minute left for each witness's formal testimony and when there is one minute left for questioning.

For those who are appearing remotely, just a few technical reminders. If you could leave your video off and microphones muted until you're called on to make your formal presentation. With respect to our remote Committee members if there are any, you may have your videos on throughout the hearing if you desire to, and we ask that you use the Raise Hand feature or physically raise your hand in the video frame to indicate a desire to comment or to ask questions. As for our in-person participants, please remember to use microphones when speaking and to switch them off during breaks and when not in use.

This hearing is recorded and a transcript will be publicly available on the U.S. Courts' website. If those of you who are appearing remotely get disconnected, please use the original Teams link to rejoin or use the conference bridge number located at the bottom of the meeting invite to join by audio.

So, with that, I'd like to call our first witness to the podium, Robert Keeling from Sidley Austin, and it's our understanding that based on your summary you'll be addressing privilege logs. So welcome and thank you for kicking us off this morning.

MR. KEELING: Thank you and good morning. My name is Robert Keeling, and I'm a partner at the

law firm of Sidley Austin, where I lead Sidley's e-discovery and data analytics group. I want to thank the Committee for the opportunity to speak to you today on this very important topic of how we can improve upon and modernize the privilege logging process.

My practice provides a unique perspective on these issues. I serve as discovery counsel on a range of matters where I manage all aspects of discovery for large corporations. The cases that I work on today typically involve the review and production of millions of documents or tens of millions of documents. Included in those millions of documents are tens of thousands of privileged communications as lawyers have followed their clients first to email and, more recently, to chat applications.

I have witnessed firsthand the incredible burdens of creating document-by-document privilege logs and the needless waste of resources that accompany current privilege logging standards. Just by way of example, since 2021, I have managed numerous reviews where document-by-document logs were required. Specifically, the number of log entries for each of those matters involved logging 22,000 documents, 26,000 documents, 43,000 documents, 53,000 documents,

and one matter involving the logging of 135,129 documents.

Composing these logs takes an enormous amount of time. For just one of the matters that I mentioned above, the contract attorney team spent a total of 21,378 hours on the single log, including redactions and QC. Outside counsel for the matter spent more than 700 hours on the log, bringing the total time on the log to over 22,000 hours. To put that in perspective, in big law, a common marker of a very busy associate is 2,000 hours a year. If you do the math, 22,000 hours, this would be the equivalent of an associate spending 11 years of their life to compose one log for one party on one matter.

As a practitioner who routinely deals with these issues, the need for privilege law reform is overwhelming and evident. The critical question for this Committee now is, what does that reform look like? Based off my many years of experience, I strongly believe that to change the privilege log burdens caused by the current language in 26(b)(5), the Committee will need to change the language of 26(b)(5), particularly setting forth that privilege logs should be proportional to the needs of the case.

Regarding the proposed changes, I have two

observations. First, regarding the early meet-and-confer requirement, parties typically do not have the information they need to meaningfully discuss and negotiate privilege log issues at the outset of a case, as proposed Rule 26(f)(3) requires. Likewise, courts also will not have sufficient information related to the scope of privilege review at this time, making it impractical for courts to address substantive privilege log requirements in a scheduling order, particularly disputes relating to privilege logging.

Now, importantly, I believe the proposed meet-and-confer requirements make more sense if combined with meaningful changes to privilege log standards themselves. In other words, if there is a change to Rule 26(b)(5) consistent with, for example, the proposed Jonathan Redgrave submission, then the proposed meet-and-confer requirements would, in my view, be beneficial.

Separately, I am concerned with the portion of the Committee notes that call for the production of rolling privilege logs. I can confidently say that rolling privilege logs are inefficient and ineffective. More specifically, they will lead to delay, increased costs, and lower-quality logs in

large document cases. In turn, lower-quality logs will lead to more disputes between parties and increased judicial resources to resolve those disputes. I suspect this seems counterintuitive. After all, parties routinely engage in rolling productions. Why not engage in rolling logs? Well, logs are different, and in particular, the more requirements put on a privilege log, the more expensive it will be.

Resources are limited. A party can focus on either the document production or the privilege log but cannot do both in a high-quality manner at the same time. Also, rolling logs will increase the likelihood of the inadvertent production of privileged documents because a party will not have enough resources to do sufficient quality control on privilege while also trying to prepare ongoing document productions.

As an alternative to the Advisory Committee notes calling for rolling logs, it may be possible to achieve the Committee's goals of early dispute resolution of these matters by asking that privilege logs be tiered or, even better, phased so that documents relevant to threshold issues, such as whether preemption would apply in a case, could be

logged early, before resolution of those issues. This will have the benefit of focusing the parties and the court on privileged communications that actually matter to the case. Thank you for your time --

CHAIR ROSENBERG: That's about five minutes.

MR. KEELING: -- and for your continued work on these important issues.

CHAIR ROSENBERG: Okay. Thank you so much. Let me inquire as to whether there are any questions, and if you feel at the end that you have not been able to say something that you intended to say in your opening remarks, we'll give you that opportunity to do so.

Let me turn first to our reporters and see if there are any preliminary questions you may have, and then I'll turn to our Committee members for any questions.

PROF. MARCUS: Well, thank you. I guess my preliminary questions are for some background, and our Committee members probably have it more than I do, but I'll remember that 20 years ago in this room I was working on the e-discovery amendments, which included various things that we're talking about. The problem of identifying responsive materials in a terabyte, say, of data that's very large, the problem of

discerning whether those identified as responsive or privileged sounds like a big challenge.

So one thing I'm interested in is why logging is a big add-on. The second thing I'm interested in is, if it's too soon to talk about this up-front, when is it timely to talk about it and how would one go about telling people to address things then? And third, related to that, if you have phased or tiered or some other name of it instead of rolling production of documents looking at, say, preemption as a defense, would you agree -- this is kind of switching horses -- would you agree that it makes more sense to focus on that than what some people we'll hear from later call vetting individual claims in MDL proceedings? So those are three sort of overview questions that occur to me.

MR, KEELING: Sure. So perhaps taking them slightly out of order. As far as when I believe this issue could be better joined, to me, it's more appropriate in the Rule 34 process, after the parties have exchanged discovery. That's when they're negotiating about appropriate custodians, and, frankly, the number and type of custodians will have the biggest impact on privilege.

For example, at the extreme example, if in-

house counsel, for whatever reason, is a custodian, that will dramatically increase the number of privilege documents. Also, typically, the more senior a custodian, the more likely that custodian is to interact with counsel and a greater proportion of privilege documents in their files, and you only know that after receiving document requests and going through that process.

To your first question, yes, the terabytes of data is a huge problem. My first matter as a junior associate, storage was so expensive that our client actually printed out emails that they wanted to save and filed them. Obviously, we're no longer in that universe. Storage is cheap. Communications happen frequently. And it's the volume that is an issue, but despite that volume, the volume has a direct impact on the cost and burden of logging. We see logging can be -- on the one matter that I mentioned, it was roughly about 23 percent of our entire discovery costs for our contract attorneys was in logging, so separate from initial review, responsiveness review, that type of thing.

PROF. MARCUS: Sorry to interrupt, but follow-up on what you just said. So somebody has to make a determination this is possibly privileged,

somebody else has to review that to decide if that's a legitimate claim of privilege. And putting an entry on a log is the big deal, those other things are not?

MR. KEELING: It is a significant part of the cost of the overall process. So, as I mentioned, 23 percent. And, yes, typically, you do have an initial review for responsiveness and privilege and then a separate review for logging. And for folks who might not do this all the time, you might think, well, why don't you do it all at the same time? I have written the world's most boring law review article on this very topic, where it's actually more efficient and less costly to segregate those reviews and have a specific review just focused on logging, but it adds an enormous cost.

And so the more requirements, for example, a document-by-document log, it forces an individualized determination, not just determination but describing the document and the privileged material in a way that doesn't provide enough detail that could risk waiver of the document, waiver of the privilege, and that's a complicated task. That takes a lot of time and money particularly at scale.

CHAIR ROSENBERG: Let me see if we have any questions from any of our Committee members.

Judge Jordan?

MR. SELLERS: You mentioned a concern about proportionality and said 26(b)(5) should be amended. Is there a reason that the proportionality rule in 26(b)(1) doesn't cover your concern?

MR. KEELING: I wish it did. There's a significant line of cases where courts see privileges different and essentially apply a perfection standard to both the privilege call itself and to the logging entry. And I think, even if this Committee thinks that it should cover, my experience and my practice is that it does not, that there is a different and higher standard that courts are applying to both privilege review and privilege logging at this time.

MR. SELLERS: As a theoretical matter, there's nothing that prevents an attorney from saying, look, 26(b)(1) talks about proportionality, Your Honor, this is not proportional to the case, is there?

MR. KEELING: I don't think there's anything preventing a lawyer from arguing that. We just see a significant number still of document-by-document logs in big cases. And so despite perhaps the attorney's ability to argue that, we see the actual practice of cases and the decision of courts still requiring burdensome, expensive document-by-document logs on

cases, and so, therefore, some further clarification, I believe, is needed.

MR. SELLERS: I'm curious. I gather your -- the cases you cite suggest that you are involved in cases involving very large document productions. You are obviously aware that the rules apply to cases with smaller volumes of production. Is there any reason why the meet-and-confer process that's been proposed wouldn't -- I realize you're frustrated, the rules, you don't think, work well, but with respect to the meet-and-confer, it's hard to design a one-size-fits-all rule for all the types of cases before the courts.

Is there a reason why the meet-and-confer process would not meet your concerns if parties were engaged in meaningful and reasonable compromise?

MR. KEELING: If parties were engaged in reasonable and meaningful compromise, I think, in most cases, the proposed amendments could work. The problem is my cases in asymmetric litigation, for example, there's no reason for the other side to compromise, and they propose burdensome privilege requirements either connected to ESI protocols or not, and you end up engaged in literally month-long negotiations over these, which is extensive and ultimately requires court involvement, and just the

current system is broken in that way and, in my view, requires some type of reform.

CHAIR ROSENBERG: Helen? And then I think Rick had another question.

MS. WITT: You mentioned that you think that the rolling production would be more inefficient. Putting aside the resource issue that you described, are there other reasons that you think that rolling privilege logging in whatever form as agreed for a particular case would necessarily be inefficient?

MR. KEELING: I think there are ways for rolling logs to be efficient, and the primary way is to put less requirements on them. Where you really get a problem is where the log is tied to, for example, a particular custodian and that you have to produce the log at the same time documents for that custodian is produced or let's say 21 days after. And so the more -- or you have to have a certain percentage of documents, so the more requirements that are put on rolling productions, the harder they are to meet and the more they lead to the problems that I mentioned, either increased costs and increased likelihood of the inadvertent disclosure of privileged documents.

CHAIR ROSENBERG: Judge Boal and then Rick.

JUDGE BOAL: Yes. In terms of the timing and method for complying with Rule 26(b)(5)(A), why do you think the current proposal is not flexible enough to address your concerns about the situation in the cases you've described? Where the parties don't know enough to make a meaningful suggestion, why couldn't you make a suggestion at the conference about when to deal with it?

MR. KEELING: Well, for example, through experience, and I should say I get hired by clients predominantly to help run privilege logs, which is an odd thing that I don't think existed, you know, even just a few years ago, and that shows the need, I think, for some type of reform as specialized counsel is now needed in big cases just for a privilege review.

But, to your point, in discussions, I'm being asked to justify why document-by-document logs are not burdensome, are not sufficient, and I respond with my experience, but if I'm going before the court at an early stage, I lack the specifics to justify the burden that you would normally have. For example, in opposing a motion to compel much later on in the process in response to the documents side, I'll lack the number of privileged documents that will be at

issue, the percentage of privileged documents, the estimated cost. I don't have any of that information at the beginning of the case, which makes my job in resisting calls for very burdensome document-by-document discovery very difficult.

CHAIR ROSENBERG: Rick?

PROF. MARCUS: Something that I think you've mentioned and I know the next speaker addresses is what's sometimes called categorical exclusions or something like that, and just as an inadequate one, suppose the category privileged or otherwise protected as litigation preparation materials therefore is excluded. I'm wondering, since I think the next speaker says something like his experience with categorical logging is categorically bad, what you can tell us about why it might be good?

MR. KEELING: So categorical logs along with metadata logs, I believe, are a reasonable alternative to document-by-document logs, and there are certain categories that should always be, I think, excluded, for example, in the vast majority of cases, such as privileged documents created after the filing of the complaint, communications with outside counsel.

In my view, the issue and the concern that was identified that perhaps categorical logs could

potentially lead to over-withholding, and while that is not my experience, I think that can be addressed by what is referred to as, like, a categorical-plus log or a metadata-plus log, which means you provide the categories in this instance or you provide documents via just an objective metadata log with the to, from, CC, things like that. And the other side then has the ability to focus in on either particular categories or particular parts of the log and then ask for more information, which could include, as appropriate, document-by-document entries.

But what you're doing there is you're limiting the document-by-document burden to documents that actually are more likely to matter. Like, the vast majority of privileged documents don't matter to the substance of the case, right? And so this categorical-plus approach is more likely to focus the parties on what matters and also, I think, will address the perceived issue of over-withholding by requesting parties.

CHAIR ROSENBERG: Okay. Well, thank you so much, Mr. Keeling, for starting us off this morning and for your responsiveness to the questions we've had. We appreciate your comments and the time you've taken to present to us.

MR. KEELING: Thank you.

CHAIR ROSENBERG: Thank you so much.

Mr. McNamara?

MR. MCNAMARA: Good morning.

CHAIR ROSENBERG: Good morning.

MR. MCNAMARA: Thank you very much. My name is Doug McNamara. I'm an attorney that specializes in consumer class actions, products cases, data breach cases, and I'm here because I support the proposed amendments. The sooner resolution on format and timing of logs can get done, the better. Rolling logs and document-by-document logs I have found in my experience are best to avoid over-withholding, in camera reviews, and re-depositions. And over-withholding is a real problem. It's been since when I started as an associate on the defense side at a big defense firm, I noted in their comment that DRI stated that if lawyers are going to cheat, they will do so in a log-by-log or categorical log basis.

Well, to me, it's not so much over-withholding is because of insincerity. It's because of insecurity. In the '90s, picture a room, a conference table, a bunch of 20-somethings around bankers boxes of papers and we have to look through these and figure out if they're privileged. We joked

this is where shaky relationships went to die and new ones were born. You'd spend eight hours with each other looking through these papers and if you saw a document and you're like I don't know if this is bad or not, I don't want to be the person that hands this over to the other side and gets fired or gets yelled at.

And as Mr. Keeling alluded to, it's still that way. We still have contract lawyers and junior lawyers making this first call. They're the first line on this, and a lot of them don't know anything about the attorney-client privilege or attorney work product or deliberative privilege or any of these privileges. So they put it on a log and they let it rest there to kick the can down the road and go to the next person.

The problem is, when that happens, you may have depositions go on, you may have discovery proceed, and then, all of a sudden, you get the log and it's like wait a minute, these documents, they should never have been privileged. And that's not me saying this as the plaintiff's lawyer. It's usually persons like Mr. Keeling, who then see the log come up to them and say, oh, I think folks were a little overeager here. And to give you an example, in 2023,

Judge Chhabria in the Facebook Cambridge Analytica case, where Facebook and Gibson Dunn gave a 180,000-document privilege log and, after some sampling, they deprivileged 63 percent of that log. And when Judge Chhabria at the sanctions hearing said what happened, the senior counsel at Gibson's response is that nervous associates overdesignated the documents to avoid waiving privilege.

And a lot has happened in the '90s, especially to me, but it has not changed with associates. Nobody wants to be the person responsible for doing that. The sooner you have logs that get done, that are kicked up to more senior counsel, that are given over to the other side, the quicker you're going to get to flesh this out and stop that.

I did notice that Mr. Keeling talked about categorical logs and meta logs, and, to me, they're very, very different. So a meta log, to me, and this is something we couldn't do back in the '90s, you can produce in a spreadsheet the to, the from, the CC, the subject matter of the document, and the date. So you're immediately seeing who got it, who wrote it, what the subject was, and when. You're already going to be able to answer certain important questions, like was this done in anticipation of litigation? Are

there any lawyers involved here? Is the subject one where we would think this probably was business advice? A lot of things are going to come right off the top from seeing that kind of a log that you won't see in a categorical log.

Let me then quickly turn to format. I don't believe there's a problem with 26(b)(5)(A) the way it's written, and the judges aren't misapplying the rule. And I also don't think you can change the rule to change what's going on. A party that produces a document that claims it's privileged has a burden under state law to meet that burden that this is a privileged document.

The judges are applying the law. That party has to show that they meet all the elements of that, and that means the judge has to look -- he or she has to look at the underlying elements. They have to see the to, the from, the what happened. And if they can't see that on a categorical log, they're going to do what even the Southern District of New York seems to do, which has a presumptive rule on categorical logs, they're going to ask for more information, they're going to do in camera reviews and send you back to do it again.

I don't think the producing party decides is

a good idea. I saw that LCJ and that Mr. Keeling had suggested that too. I don't think you can allow that party to have that right. Again, they have the burden to do it at the end of the day. So that's where this is not just asymmetric litigation. You have the burden, you're taking the extra step.

And then, finally, in terms of the Committee note, I think I agree also with DRI that some examples of adequate logs in the note would help. And I gave a few in my testimony that Judge Grimm had, of course, for the District of Maryland and also Judge Waxse included in a decision before. Thank you.

CHAIR ROSENBERG: All right. May I turn to our reporters to see if there are any questions of Mr. McNamara?

PROF. MARCUS: If I may, I think I'd like you to expand a little bit about what you called meta logs and tell us whether those are almost push-a-button items and also why that isn't good enough for you in a document-by-document sense or some other sense because maybe that's easy to do. And then, finally, in terms of rolling or tiered or phased production, have you found that that has worked well in terms of document production and privilege logging or privilege review in the cases on which you work?

MR. MCNAMARA: Sure. So the meta logs are a great way of winnowing things down. You can imagine the spreadsheet, you'll have the to, the from, the day, all the recipients, the subject matter that's in electronic discovery, you have a lot of the things you'd see in the log except that last column where the lawyers are doing the analysis and saying privileged because it, you know, dealt with this issue. You can cut down a lot of the stuff that's going to be on it. You can basically get rid of the chaff because you realize, well, it went to too many people, there are no lawyers on it, et cetera.

It's a good step. It actually can save time and money, but at the end of the day, if you're the party claiming the privilege, you got to do that last column, you have to say why it's privileged because you have to justify it. You don't get to just say I want to keep it. So you will have that column eventually. It might save some time and money to do a meta log first. Whether you call it a tiered log, I don't think we're that far apart with Mr. Keeling on that, on how to get to that point. But that is something you could discuss with the parties at the initial conference. You know, that's exactly why this is a great idea in the rule.

PROF. MARCUS: And when you say the last column, attorney-client privilege, litigation preparation, what are the sorts of things one could enter in there that would help you?

MR. MCNAMARA: Well, it's going to be exactly -- it's going to be -- well, unfortunately, a lot of times they just put ACP AWB and they treat them as the same. But, usually, you're going to see something substantive in that column will be withheld because litigation advice, withheld because question for a lawyer. There's going to be some information there that actually is a justification that the producing party is giving to why to withhold it, and they have to do that at some point.

PROF. MARCUS: But isn't that part of the review process necessary to determine whether to withhold the document, not just to make a list?

MR. MCNAMARA: Correct. But a lot of times with custodians, especially say you have -- as Mr. Keeling indicated, you may have an in-house counsel as a custodian. You might have a lot of documents there, but then, when you look at it and you realize, well, it went to the in-house counsel, but it also went to 50 other people in the company, you know? It went to the in-house counsel, but it also went to everybody

doing the incident response in that data breach.

You can pretty quickly see this is going to be business advice. It went to the in-house counsel, but it went to the people who were answering questions for the PR. So you can do a sufficient -- significant amount, I should say, of winnowing down by doing a tiered log. And if you have folks that can discuss this early on in the process at the initial conference, it saves some time.

This also goes to the idea about the rolling log being one where -- and it has been for me a time-saver because the quicker you get the log, especially early on, you might say I'm seeing a lot of documents that involve this particular third party. I don't think it's privileged because they did, say, a forensic report. And you could have that fight in the beginning of the case instead of having that fight at the end of the case, when people have already been deposed and you have to do depositions again.

PROF. MARCUS: You mentioned depositions that occur before what we're talking about has been completed. Are you suggesting that we should say depositions should not occur until that process is completed?

MR. MCNAMARA: Absolutely not. No, no, not

at all. And that's part of the idea of seeking rolling logs, of seeking cooperation, seeking discussion with the other side about the format of the privilege log up-front. A lot of times, we would get a log a couple of months down the road, maybe right before the end of fact discovery, and, you know, it's a static document, doesn't have a lot of information, we have to go back and there's letters back and forth, and by the time you get the log, you know, you're almost done with fact discovery. So the sooner that this issue can get resolved, it's more efficient in my experience.

CHAIR ROSENBERG: Thank you.

Andrew?

PROF. BRADT: Thanks. This dovetails a little bit to what you were saying, but I wonder whether you could comment on Mr. Keeling's point that the -- or his assertion that the conference considered by the rule is too early to be productive in a lot of cases. Has that been your experience, or is there much you can do at the very outset of the case, you can accomplish?

MR. MCNAMARA: There's much you can do at the outset. First of all, you've got to just, you know, agree, is there going to be certain things that

categorically you don't have to log? Hey, this is a case where there's nothing you have to bother logging after the lawyers have been engaged and the litigation has started because there's not going to be any ongoing issue or that there's particular things that you can just forget about logging on both sides. Usually, also, at some -- as soon as the litigation starts, you have some idea of who the custodians may be and you could discuss those hand-in-hand.

These are going to be the key custodians. Let's do a metadata review of those and figure out from there, especially if they're the most important custodians, where we're looking at it, and we may get a pretty good idea of the landscape thereafter and also the format. You know, if there's going to be a privilege by a doc-by-doc or a categorical log and there's disagreement, bring it up sooner with the court so that nobody wastes their time down the road with invective letters about your log is terrible; no, my log is sufficient. So I think it definitely would save some anguish to do that up-front.

CHAIR ROSENBERG: Ariana?

MS. TADLER: How often are you finding that you and your opposing party are agreeing to a 502(d) order and bringing that to the court?

MR. MCNAMARA: A hundred percent. A hundred percent. Well, I at this point don't have a case where I have an adversary who does not put a 502(d) either in the protective order or in the ESI protocol or somewhere else. And that should to some degree help with the fear of inadvertent production. You know, if they do produce too much because there is the emphasis on getting the production out there, it can be clawed back, and that does seem, I think, to take out some of the concern about a time-consuming and arduous log or else we end up waiving something. No, you don't waive it. Under 502(d), you can still get it back without having to worry about subject matter waiver.

MS. TADLER: How familiar are you with other cases? I mean, this may be your practice in the types of cases that you're involved in. In other -- Mr. Keeling, I think, was often focused on asymmetrical cases during his testimony. Are your colleagues that you're aware of also agreeing to those and are they on their own promoting the inclusion of them?

MR. MCNAMARA: I don't know any of my colleagues who have opposed a 502(d). Again, the goal on my side is I would like the documents as soon as possible so that I know what -- I have a Rule 16

obligation, I've got to prosecute my case. I've got to show I'm being due diligent. I want to get my documents. If it means that I have to agree to a 502(d) so that I lose the chance of arguing waiver, I'm fine with that. I would like to see the document as soon as possible so I can make that assessment, know what to do next, know who to subpoena, get the depositions done and move quick as possible.

I don't know anyone who -- if they don't understand what a 502(d) is, then that's something we should probably do a better job on my side of the "v." to educate them, but I don't know anyone who really objects to them.

MS. TADLER: And I should have asked the question to Mr. Keeling also about 502(d) and how that impacts practice, so we might want to come circle around on that with some others. Thanks.

CHAIR ROSENBERG: Okay. Thank you.

And Ed?

PROF. COOPER: All of these discussions invariably focus on attorney-client privilege or trial preparation. Is that because other privileges seldom arise or because they are more easily identified?

MR. MCNAMARA: They do -- I have seen, especially with folks that have deliberative -- that

deal with the government and have regulatory interactions, those do come up as well, and those will often -- those are easier usually identified because of the number of parties involved. There's specialization at that particular firm, so you might see it real quick.

Whereas, with work product and attorney-client, unfortunately, some corporations, people got the idea, if I slap the word "privileged" on an email, it's automatically privileged, or if I CC the in-house counsel, it's automatically privileged. And I think that also has exacerbated the amount of privileged documents that persons like Mr. Keeling have to go through because they're just -- they're not really privileged. But you don't get that as much. People don't usually say deliberative process on an email because they're afraid of turning it over, so it doesn't come up as often.

CHAIR ROSENBERG: Okay. Thank you so much, Mr. McNamara. We appreciate your time.

And Ms. Massaron? And as I understand it, you'll be addressing Rule 16.1.

MS. MASSARON: Yes, that's correct. Good morning.

CHAIR ROSENBERG: Good morning.

MS. MASSARON: I want to thank the Committee for allowing me to appear. I'm Mary Massaron. I'm an appellate lawyer at Plunkett Cooney in Michigan. I've been practicing appellate law for a little more than 30 years. So my vantage on the Federal Rules of Civil Procedure comes from my experience in a law firm with the firm's clients, my clients, and my partners coming to inquire of me what's allowed and what's not allowed as litigation proceeds.

And I've had an abiding faith in our Federal Rules since my civil procedure class in which Professor Lombard started the day, my first day in law school, holding up the Federal Rules and saying, listen to the rules, there shall be a complaint and an answer, it's almost biblical. And he had a passion for the rules which he certainly communicated to me. I commend you for the hard work you do, particularly in the MDL area, where this question of rules is difficult and where I think it's widely agreed that there are problems, but finding a solution is not easy.

A few years ago, I represented a Greek entity that was litigating in this country and, again, they had tremendous faith in our judicial system, which was really quite inspiring to me, and they

wanted to know, though, in our initial meetings, how these rules worked, what will the process be, what can we do, what can the other side do, how will the judge approach this. All of that requires rules.

And so I thought it might be helpful to sort of set a kind of foundation about something that I think we all know but that I think is important to keep in the front of our minds as we think about what to do about the problem of meritless claims which exist in the MDL context. Certainly, our rules were initially adopted because there was this what one scholar called a chaotic and complicated condition caused by the lack of rules. And I think we've heard people talk about the MDL context as being sort of like the Wild West because of the absence of specific rules for that context, which now, after all, is an overwhelming proportion of the litigation in our federal courts.

And one description of what is a rule is or a rule of law system that Ronald Katz talked about that I think is sort of a touchstone, when you have a rule-based system, you have principled predictability, derived from valid authority, external to the government decision-maker. That would be the judge in litigation. And so the touchstone is, does how these

cases are proceeding satisfy that definition from Ronald Katz or some other comparable definition?

And I thought it might be helpful, because I understand there's been a great deal of discussion over many years, to talk a little bit about rules and flexibility because I know that the MDL context, there's a great concern about having flexibility remain and how will rules work with that.

One thing that I think about a lot when I think about rules and that I talk about in briefs that I write about how to interpret rules or how a court should think about a rule that's under dispute is the difference between three categories.

One category is a sort of bright-line rule. And, of course, some of our Federal Rules of Civil Procedure are very bright line, although even there, where there is specific timing, often the specific timing is preceded by the words in general, and then there's an opportunity with that bright-line rule to build in flexibility on a showing of good cause for some different option. But, nevertheless, the standard, the default, is a bright line, and everybody, a new person to the system, a company from another country, an associate just learning how to practice law, can look at that bright line and

understand in the ordinary case in this context this is what's going to happen, and on a showing of good cause, some other thing will happen.

A second kind of rule includes a standard, and our Federal Rules have standards as well. One good example, I think, is also under Federal Rule 12(4)(e), which allows a motion for a more definite statement, and that rule has a standard for when that motion should be granted. The standard is, is the pleading so vague or ambiguous that a party cannot reasonably prepare a response? That gives you a very firm notion of what's required even though it allows for flexibility in the particular circumstance.

And then there are ad hoc. I don't think ad hoc decisions are rules. We don't know about them in advance. They're not something that give guidance. There's no standard that anybody could look at, no bright line that anybody could look at after the fact to say whether that ad hoc decision conforms or doesn't conform, and, to me, that's a problem in the current situation.

CHAIR ROSENBERG: If you could just maybe wrap up, and then we'll see if we have any questions.

MS. MASSARON: Sure.

CHAIR ROSENBERG: Sure.

MS. MASSARON: Really, the only other point I had was simply to say, if you look at our Federal Rules, and I read them again yesterday actually on the plane, parts of them, they're brilliant at having a bright line or a standard while allowing for flexibility. It seems to me that the pleading requirement, and I want to focus specifically on the LCJ proposal to modify the disclosures, it seems to me that if that were to be adopted, it would be a start of trying to deal with the enormous problems that I think everybody recognizes of meritless claims that are not addressed until at the back end of the litigation, which cost enormous amounts of time and resources for the courts and the parties.

CHAIR ROSENBERG: Thank you so much.

Rick?

PROF. MARCUS: Thank you. I think I have one generalized question or two really about your list of categories of rules. One is the ad hoc rule authority perhaps included in our 16.1 is really pretty similar to what's already and has for 40 years been in Rule 16, which says the judge must set schedules and so on. And I wonder if you think that's a rule.

And I also wonder about something else

that's raised by LCJ, I think, and others, which is that -- well, a rule can also say, Judge, you have authority to do X, and one X that might be filled in there is appoint leadership counsel. Would that be a rule if it clearly gave a judge authority to do that where there's some doubt about it?

MS. MASSARON: I'm not at all sure that the rules can give a judge the authority to appoint a leader of lawyers for parties before the case.

PROF. MARCUS: Oh, no, no, I'm not talking about that. I'm just saying that would be a rule, wouldn't it?

MS. MASSARON: I'm sorry, I'm not understanding your question.

PROF. MARCUS: Well, that's another -- a rule can also grant authority. You could debate whether it should be granted. But that's a rule also which doesn't seem to be in one of your other categories.

MS. MASSARON: That's a sort of enabling rule. I guess my comments are directed more toward those rules that are designed to provide the roadway for a lawsuit and to urge you to adopt rules that make that roadway and the procedural mechanisms by which the parties lead their litigation on each side clear

so that lawyers and judges who don't know that from the get-go can look and get a picture of how it's supposed to proceed.

And litigation, I don't have to tell you or anyone in this room, can be very complex. So not every litigation follows the same path. But, if you think about it as a decision tree, there's a complaint, there's an answer, then there are various procedural mechanisms that govern the next steps. One of the things, and this goes again to the disclosures and the problem of meritless claims, and I think it is strongly related to the idea of the rules, is that our Federal Rules historically have provided very bright-line procedures for weeding out meritless claims at the outset. The lawyer who files a complaint has an obligation. We understand that, for a variety of reasons, that obligation to know that there's standing and to have done some preliminary review isn't happening in the same way in the MDL context, and that, to me, is a serious problem.

Then the rules provide for motions to dismiss, but, because of the volume, those have been perceived and have not been the answer one might have thought. So the LCJ modification of the proposal in 16(4), I think, is an effort to make that work better

in this context so that everybody knows how it's going to work and so that it avoids this problem of these meritless claims sitting, making it hard to settle, making it hard to process, adding to the discovery costs, and really contravening the fundamental philosophy of the rules, which is to allow for an early elimination of meritless claims.

CHAIR ROSENBERG: So let me just interrupt to see if there are any -- and I know Mr. Dahl is speaking next for the LCJ proposals. Any questions from our Committee members?

Andrew, did you have a question?

PROF. BRADT: Yeah. I guess I'll just follow up on Rick's question about Rule 16(c) and the laundry list of things that a judge may consider at a pretrial conference and why, if that rule is acceptable, why not this one? And also, why doesn't this rule enhance the ability to lay out a roadmap better for those who are uninitiated in the LCJ process or in the MDL process?

MS. MASSARON: And here's my answer to that. I think that laundry list is something that really belongs in the manual for complex litigation. It belongs in judicial training. I don't think it's the kind of rule that helps the parties know the roadmap

for the case and it's not the kind of thing that has historically been in the Federal Rules.

It seems to me our system has been an adversarial system. And I understand there's maybe debate, certainly debate about how much the judiciary should be managerial versus how much the judges should be deciding matters as brought and litigated between the parties. But wherever that line is, it seems to me incorporating all of that here as a way to deal with the MDL problem is not the answer. The answer is to try to make these rules in a much more rule-like fashion apply in the MDL context, and that's what I would hope that the Committee would be able to try to do. I understand it's difficult.

CHAIR ROSENBERG: Thank you. We so appreciate your comments and look forward to further discussion on some of these issues.

Mr. Dahl on behalf of Lawyers for Civil Justice, and I know you're going to try to address both privilege logs and Rule 16.1, so good luck doing that in five minutes.

MR. DAHL: Thank you. It's a great honor to appear before the Committee. The Committee has identified two very serious rules problems in the MDL context, that the FRCP are allowing a very large

number of claims that do not belong in cases and do not belong in our courts, causing avoidable management problems and fundamental questions about well-accepted legal standards and basic fairness.

In the privilege logs, an overwhelming burden caused by a misunderstanding of the rule and the comment to Rule 26(b)(5)(A). One commonality between these two rules problems is that they are well defined already in the rules and they have been changed by practices that have changed the meaning of the rules in unexpected ways and now need fixing.

Another commonality is that the Committee's proposals address these two rules problems only indirectly, without directly fixing the rules' problem. I'll address MDLs first. It is highly needed in the FRCP to have rules governing MDLs, just like all other cases, and to keep the FRCP true to fundamental legal requirements. As I understand, the Committee's purpose in 16.1 is to help identify issues that should be addressed early in order to avoid problems later. 16.1(c)(4) is meant to address the well described phenomenon of unexplained, unexamined claims hampering judicial management. A new MDL judge needs to know this: the FRCP rules about claim sufficiency are likely to have no effect in your new

MDL. Many, even most, of the claims do not belong in the litigation and have no relationship to the case. The claimants never used the product or suffered any injury within the scope of the case.

This problem provides management problems and opportunities. Ignoring the problem will impair the judge's ability to understand and manage the case, while taking action on the problem will inform the decisions about discovery, motion practice, bellwether trials, and other matters. Ignoring the problem prevents parties from reaching resolution, while addressing the problem can accelerate the parties' understanding of what needs to happen to resolve the case.

Kicking the can down the road does not save any effort or time. You will eventually have to figure this out. I point your attention to the recent order in the 3M case: "Where, as here, counsel failed to adequately organize and manage their inventories, a domino effect develops, resulting in the disruption of hundreds of thousands of other MDL cases." The order says this stops now.

Well, it's a good thing that this stops now. Now, in that case, is years after the largest MDL has been proceeding through the court system. Now is not

the right time to deal with whether those claims belong in that case. It should happen first. And this is a central concept of our comments to the Committee to pay attention to the prophylactic effect of a rule. A rule can create compliance with the well-accepted pleading standards and due diligence requirements. Only a rule can be effective because waiting for each judge to decide whether there is going to be enforcement and how that enforcement will go and negotiating it is only an invitation to file meritless unexamined claims.

The notion that such a rule would constrain judges in the management of the cases is false. Such a rule would liberate the judges from having to deal with the problem in the first place because it would prevent the filing of unexamined claims.

This relates to the fundamental reason why this is a rules problem. The rules that govern the pleading standards and due diligence in all other cases are not working. Rules 3, 7, 8, 9, 11, and 12 ask this existential question, do the FRCP define pleadings and pleading standards and discovery tools, or do they only do so in 30 percent of cases, the 30 percent that are not consolidated into MDLs?

In MDLs, there is effectively no guidance,

as if there were no Federal Rules of Civil Procedure. You will hear more from other people today on these topics, but ignoring the rules should be unacceptable to courts, and leaving the rule problem unfixed should be unacceptable to the Committee.

I refer to the comment where we've proposed changes to Section (c)(4) and also to describing why the note should explain why the Committee is proceeding with this rule, what the problem is, what the problem you're trying to solve is, and, also, I'll touch on the other topics in the rule that we mention that are not rules problems and therefore should not be included, and in fact, some of them are going to create new rules problems.

I'll switch quickly to privilege logs.

CHAIR ROSENBERG: Maybe take a minute or so and let me see what questions we have. That's been your five minutes, but I do understand you're covering two proposed rules and many other witnesses have referred to your filing, so why don't we give you another minute or so.

MR. DAHL: Okay. I'll make it very brief. Again, as in the MDL context, the Committee got this right in 26(b)(5)(A) describing what the privilege log responsibility is, that it does not include a

document-by-document in every case. The rule is meant to be flexible and allow discretion. The problem is that an overwhelming number of courts don't understand the rule as saying that anymore.

It is creating enormous inefficiencies. I adopt the comments of the people who are more experienced than I am in this topic. It is causing a great deal of time and money down the drain for no purpose. It is inviting gamesmanship and satellite litigation. The Committee's proposal will no doubt help by encouraging people to discuss the problem. However, no one who turns to the source of the logging obligation, 26(b)(5)(A), is going to see these amendments because they are amendments to other rules.

It is clear from the proposal that it is meant to fix the problem of 26(b)(5)(A). There are a dozen references to (b)(5)(A) in the Committee's proposal to amend other rules. A better solution would be to address the problem in the source of -- where the source exists in (b)(5)(a) or, at the very least, make a reference in that rule to the new amendments and define the standards of what sufficiency means in a comment and a note to (b)(5)(A). Thank you.

CHAIR ROSENBERG: Thank you so much.

Rick, do you have any questions?

PROF. MARCUS: I think I have mainly about the MDL, but let me go backwards with the last thing you mentioned. You would like to see something as a beacon in 26(b)(5)(A) that says you should go look at 26(f), which presumably is where people will look if they're complying with 26(f), and that's a long time before they have to do the privilege log, so I'm not clear why that's useful. But I gather you think a cross-reference would be valuable there. And I think from the position of, say, the plaintiff's side, maybe a question is whether there's any downside to that.

Several of the submissions we've received, I'm switching to MDL now, in terms of what sometimes is called vetting, urge that evidence must be presented up-front, facts must be presented up-front, and so on. Why isn't it enough to call the attention of the parties in the court to how that should be done in a given case rather than trying to prescribe how it ought to be done? Because that should vary. That probably varies a great deal with different kinds of cases. That's one question Shouldn't we leave that for attention with individual specifics?

The other question on that is something I raised with someone else earlier. If there's a

preemption issue or something like that which might clear the board, shouldn't the court deal with that before doing the difficult, challenging, and expensive process of individual scrutiny of cases, particularly if you think no motion is required and the court has to do this all by itself? So I think, basically, the point is why doesn't this put the responsibility where it can be addressed most effectively?

MR. DAHL: The answer, Professor, I believe, is that a rule that describes the standards will have that effect without the need for judicial involvement. If the rule says that compliance with the well-described pleading standards and burdens of going forward will be addressed early in the MDL, what will happen is that people will act accordingly, and just as with the other rules, by and large, people are going to follow that.

There will, of course, still be room for and a need for courts to define what that requirement will be in a particular case. But the point of it, that it will happen, should be a rule, because only that is going to communicate to all parties, future parties day one of the case, even before day one of the case, what is an MDL? How does an MDL work? Well, early on in an MDL, claimants are required to make a very basic

showing that they have a claim, that their claim belongs in the case. That will be defined by the judge early in the matter. That will address -- that will avoid the management problem of having to address the unexamined claim problem.

And it will also answer your second point about prioritizing what the judge has to do first because these problems, by and large, aren't going to come to the judge's desk if the rule prescribes that there will be a process for eliminating the meritless claims, so don't bring them.

CHAIR ROSENBERG: Andrew?

PROF. BRADT: Thanks. I have a question about the unvetted or unsupported claims piece. And what I noticed in your submission in this initiative, others who are taking a similar view, is that the citation to that is either anecdotal or to language in a 2018 subcommittee report of this Committee. My question is, are you aware of any empirical data that we can cite to about the extent of the unsupported claims problem?

In an article earlier this year in the Texas Law Review, Professor Ray says he's not aware of any empirical study of the number of meritless claims in MDLs or the extent of the problem. So I just wonder,

is there something new or something you can point us to that would go in that direction?

MR. DAHL: I believe there are studies on that topic, but I am not fluent with them, so I don't know. I do think that part of the problem perhaps is that, to some extent, we don't know what we don't know. There is not vetting of unsupported claims until very late in the process, if ever, and that information may exist with claims administrators and others rather than easily known. I mean, that's the problem at the beginning of an MDL. The time of the 16.1 conference, nobody has any idea how many of the claims are unsupported, but it's widely understood that it's a large number, half or more in a lot of these big cases.

PROF. BRADT: And is there -- you say half or more. Can you point to something that would substantiate that in any particular case?

MR. DAHL: I believe that's the general understanding. I don't know that there are studies on that. I don't know it's possible for studies to be on that. But I do think there's literature on the topic.

CHAIR ROSENBERG: Judge Proctor?

JUDGE PROCTOR: Thank you. Back to the first sentence of Section 1407(a), "When civil actions

involving one or more common questions of factor are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings."

Okay. It seems to me what you're proposing is that these actions be transferred to a transferee judge for individualized proceedings, which would look no different than where they were where the good Lord flung them. And so my question is I think a fair pushback on your position would be I think your assertion is you haven't heard us, and I think we would say, as the subcommittee, oh, no, we have heard you and we have provided in Subsection 4 a provision that allows the transferee judge to say you're exactly right, we have to dig in right now to these individualized actions and see if there's a basis for their filing.

But, as Professor Marcus said, there may be other cases where there's an across-the-board issue, whether it's preemption, general causation, an arbitration provision, or some other across-the-board dispositive issue that should be prioritized in coordinated proceedings, and why wouldn't Subsection 4 permit that flexibility that would actually inure to the benefit of the clients and lawyers you're

representing, where they wouldn't be spending tons of money on individualized matters when there's a potential TKO at the beginning of the pretrial proceedings?

MR. DAHL: The operative word of the sentence you quoted from the statute is "actions." And I don't think that it is appropriate to presume the actions exist where people do not have Article III standing or any claim or entitlement to the claim.

And, secondly, I think, as a management issue, your second point, I urge you to keep in mind the prophylaxis of what a rule would mean. It's not a matter of whether the judge has flexibility to manage the case. It's whether or not that the problems that land on the judge's desk are going to include all of these unexamined claims or not.

JUDGE PROCTOR: Let's put you in a conference room with your client in a big MDL and you're talking to your client about litigation strategy and you're saying, you know, we have a motion we're going to file on general causation or preemption that we think has an 80 percent chance of knocking each one of these cases out, but what I'm going to propose is that our law firm immediately start looking at each tree in the forest while we're doing that,

even though we think there's only a 20 percent chance that's going to have to be done eventually. What do you think your client's going to say in response to that?

MR. DAHL: Are you presuming that a rule has already taken effect of not filing --

JUDGE PROCTOR: No, I'm just talking about in a vacuum. I'm talking about in a vacuum. I'm talking about what is the smart management of litigation practice even from a defendant's standpoint?

MR. DAHL: Well, Your Honor, I take your question very seriously, but I think that the point really has to be what a rule would mean about changing that dynamic in the first place with no judicial involvement by creating the expectation and creating the standard that claims that are filed into the MDL belong in the case, have some relationship in the case. I think that a motion of -- you know, it may be the most efficient way to deal with the case, but you can do that without having thousands of meritless claims pending or having no idea what those claims are until they've been --

JUDGE PROCTOR: I'll end with this. Would you agree with the Committee today, following up on

Professor Bradt's point, that if there are studies that pinpoint some of these empirical issues that you're contending, because there's a difference between a widely accepted assertion and a widely accepted set of data, that you would share that with us? Because we have not received that to this point. I think that's why Professor Bradt was asking about it.

MR. DAHL: Of course, that would be helpful, but the problem is that we may not know what we don't know, that because of these -- because there is not vetting in this way, we don't know. That's the problem that arrives on the desk of the newly appointed MDL judge in the initial conference.

JUDGE PROCTOR: But, if we did vetting in these cases instead of consolidated or centralized proceedings, it would grind the MDL process to a halt, wouldn't it?

MR. DAHL: No, I think that's exactly the point that I'm trying to get at with the prophylactic effect of a rule. Perhaps this thought experiment would work. What if we didn't have any traffic rules in our community and we convened this meeting and the proposal was made, let's put a stop sign at the intersection so that everybody knows they have to stop

every time they enter the intersection, and somebody says, no, no, no -- the chief of police, no, no, no, we can't make it illegal not to stop at every intersection because we would have to put a police person at every single intersection and arrest every single person --

JUDGE PROCTOR: I think your analogy, quite fairly, is, if we need a stop sign at every intersection, then the pushback would be no, at some intersections, we need a traffic light so that you get the green light to go. Some we need a yield sign. Some we need a four-way stop. That's the flexibility of intelligent development of a traffic pattern, it seems to me.

MR. DAHL: But I think this one is different because what the flexibility argument is, is there may be circumstances where someone should be able to run a stop sign. They're on the way to the hospital. It's the middle of the night. No one's around. They have a great field of view. Why would you make it so they have to stop?

What I'm getting at, though, is the effect of rules is that they largely create compliance and, in this case, create compliance with something that the rules already describe and everyone accepts that

you have to have some basis to file a claim in court before you do it. That is the rule's problem because it exists -- it is taken care of by the existing rules in all other cases, but that rule is not having the effect in MDLs. That is the MDL rule problem that I think this Committee has identified and should solve, and solving it with a rule, creating that expectation that there will be a process to enforce the standards early in an MDL, will largely make the problem not here.

JUDGE PROCTOR: That's the key point, right? We have -- the MDL process has methodologies, rules, procedures for dealing with meritless claims. You just want those bright lines to be put at the beginning of the case, not upon remand, not upon summary judgement, not upon a 12(b)(6) motion, correct?

MR. DAHL: I would urge that if the rule made it clear that that is what is going to be required in each case, that it would make the problem largely go away, it would keep the judge's discretion of how and when to deal with that problem, but the flip side is this, that if you don't make that a rule, then what everyone understands is that each judge in each MDL is going to make that decision later, and in

the meantime, the only answer for the practitioner is, well, go ahead and file all of your claims because we don't know what's going to happen in the case.

PROF. MARCUS: Mr. Dahl, can I -- Judge Lauck has a question, but this is switching gears a little bit. It seems to me one of the things we have been told is that Rule 26(b)(5)(A) and the attendant Committee note didn't create an expectation to do what you wish would have happened if that had been followed. So do rules really create these expectations that you're talking about? In that instance, apparently not. Why would this one do what you want in a way that avoids the pitfalls that Judge Proctor's talking about?

MR. DAHL: You're talking about the note to the privilege log rule?

PROF. MARCUS: Well, yes, I think you say, well, gee, courts are not following what you told them to do. Well, neither are litigants. So why should we expect 16.1 to have this socialization effect that you are urging upon us?

MR. DAHL: No one has commented more carefully and insightfully about the difficulties of writing rules and causing their effects than you, Professor, so I hardly dare to address it, but I do

think that the Committee shouldn't throw up its hands and think that this is an unsolvable problem. Again, the commonality is the principles that we're talking about here already exist, already exist in the rules. This Committee has developed those standards. Practices have overtaken them in these two areas. And it is a small thing for the Committee to address the problems with the existing standards.

And perhaps this addresses Professor Bradt's question as well, that if this were a revolution, maybe more studies and more empirical data is required. But this isn't a revolution. It's not even an evolution. This is applying the concepts that are already in the rules in contexts that have changed due to unexpected things that have nothing to do with this Committee. But, nevertheless, the standards have changed and the rules need to be fixed to accommodate those practices in both of these instances.

CHAIR ROSENBERG: Joe, then Judge Lauck.

MR. SELLERS: I'm curious whether you think the proposed rule erects any barriers for courts, transferee courts to make the kind of assessments early or whenever it's appropriate that you are eager to have done. It seems to me that every transferee judge has an interest in ensuring as quickly as

properly possible to whittle down the claims that are merit -- to those that have merit and exclude those that are meritless and that part of the plan behind the rule as proposed is that process may vary from MDL to MDL depending on the size and nature of the evidence and the like, and at least as I have viewed the proposed rule, it's identifying tools in the judicial toolbox to be able to address these.

So I'm curious whether you think there's some barrier in the rule as it's currently drafted to achieve the goal that you're proposing.

MR. DAHL: There is a barrier that is not in the rule and there is a tool that is not in any judge's toolbox, which is to set that expectation and standard before day one of a rule that you can read in law school and know about before you file the case or before the case is filed against you. What is an MDL? Well, an MDL is a procedure that includes, among other things, an early showing that you have enough support to go forward with your claim in the case.

No judge can do that. A judge who gets a newly assigned MDL, taking on that topic, it would be months before the judge could make that decision, communicate it, describe it, and give it effect. And if there's not a rule, one judge can't create the

expectation that that's what all MDLs will require, and that's the problem that only a rule can solve and why a rule would help all future MDL judges manage their cases.

MR. SELLERS: So I understood your written comments to recognize that the proposed rule is not intended to displace all the other rules of civil procedure. They continue to have application in these proceedings. So wouldn't you agree with me that the rules that already exist that put counsel on notice that they have to file complaints that satisfy Rule 11 and satisfy other portions of the rules will still apply to them and give them the guidance that you're seeking? And I don't see why that is not sufficient.

MR. DAHL: I absolutely agree that those rules apply, and the problem is that they're not having the effect and the reason is, and I'm channeling what transferee judges have said, that there is something about MDLs that's different. I don't read in the statute that what's different is that there are no pleading standards or no requirement of Article III standing to allege an injury. What's different about MDLs? Multiplicity of parties.

So the system under the current rules that's designed perhaps for one-on-one, one-party cases, two-

party cases, that involves a pleading and a review, a motion to dismiss, and allowance to file an amended complaint and another review times 20,000 is where you get to Judge Proctor's point of a judge would do nothing else.

And so the idea, how do you solve for that? How do you enforce the well-accepted and documented pleading standards in a case with 20,000 claimants? And this is our attempt to help the Committee do that, which is require from the get-go some information we have proposed evidence of exposure and harm that would satisfy all those pleading burdens and standards without bogging down the court and the parties or even, frankly, creating a new burden. I mean, the burden to have that information going forward exists in all other cases under the rules today.

CHAIR ROSENBERG: Okay. Thank you.

Judge Lauck, you do not have a question?

Ariana?

MS. TADLER: So, Mr. Dahl, in your September 18 submission or LCJ's submission, you have a proposal with specific language. Are you continuing to promote that language at this time?

MR. DAHL: Yes, yes. That language or something close to it.

MS. TADLER: So my question to you is, is this language really intended to focus more in the personal injury and mass tort arena because MDLs are not exclusively mass torts?

MR. DAHL: Correct. Most of the problems of big MDLs exist in the mass tort arena, as you well know, and so, yes, it has -- with that problem, with the rules problem in mind, that's where the language comes from.

MS. TADLER: Okay. Because, obviously, you know this because you've read the rules for so long and we've talked about this so frequently, that the rules really do need to be so that they don't focus on any one type of case. And so I'm just wondering, are you contemplating that this would somehow have a carveout?

MR. DAHL: I contemplate that just as with all of the other rules that when they don't make sense, they don't -- or they are just not so prescriptive in cases, I mean, as you well know, it is very common practice for parties to agree and judges to agree to different practices when needed. So we do not intend the rule to be any sort of barrier or cause any more extraneous or inapplicable work in MDLs as any other rule would.

MS. TADLER: Thank you.

CHAIR ROSENBERG: Mr. Dahl, are you going to be spending the day with us today, or did you intend on leaving after your presentation?

MR. DAHL: I intend to stay here for the duration.

CHAIR ROSENBERG: Okay. So we may have additional questions if that's all right. We're going to move on to the next witness, but as long as we know you're going to be here, I want all of our members to know that there could be follow-up. And I say that because you're trying to cover two important -- both rules, well, three, and many people did reference your submission, so it thus follows that there may be more questions directed to you. So thank you so much.

MR. DAHL: Thank you, Your Honor.

CHAIR ROSENBERG: Okay. And, Mr. Stoffelmayr, if you could come forward, and it appears as if you're addressing 16.1. And, you know, to the extent that some of the points have been made, obviously, in the interest of time, no need to repeat certain points unless one of our members actually has a follow-up question and they refer back to any earlier comments, but we'd like to hear anything that we haven't heard. And that goes for all of the

witnesses. So welcome.

MR. STOFFELMAYR: Yeah. Thank you very much. My name is Kaspar Stoffelmayr. I practice at Bartlit Beck in Chicago. And I've submitted a not long but longer comment and just want to highlight maybe a few points. I appreciate the opportunity to do so in person.

The first thing I want to say is just, you know, how thankful I think many of us are that the Committee has drafted and is talking about a rule for MDLs. A lot of us have thought that's long overdue at this point. I had a conversation with some colleagues last week when they said, you know, we've got this case, we think it's going to be swept into this MDL, what should we expect to happen? What should we be telling the client is going to happen?

And I thought, well, if it was a normal case and someone said we've been sued, what's going to happen, you'd say, well, we'll look at the complaint. If we think there's a legal issue, we'll file a motion to dismiss. If not, we'll file an answer. Here's what goes in an answer. Then there's going to be some discovery. When the question was what should we expect to happen in the MDL, you know, my answer is, well, first off, who's your judge? And then there's

four or five things that can happen, and if this judge has a track record, we can use that as a guide. If not, you know, all bets are off.

And there's a view that that's a good thing, that, I think -- I mean, I've been in many conversations with parts of this group. There's a view that, you know, more flexibility is always a good thing. And I hope this is not too much of an unpopular view in this room, but there are concerns there are times that judicial flexibility is not just a one-way good thing. And I don't want to repeat everything Mr. Dahl said, but one really, really important way in which flexibility is counterproductive is, when people don't know before a case is filed what is going to happen and they don't know what the expectations are going to be of them and their clients, they will adjust their behavior accordingly and not in helpful ways.

So that's maybe, you know, sort of the big and that gets to -- you've heard plenty about this unsubstantiated claims problem, there are many people after me. I'm not going to repeat what has been said and what will be said. But I do just want to emphasize that that is not independent. That problem is not independent from the more general problem that

when we don't have rules people will adjust their behavior.

More generally, I mean, coming back to the draft rule, like I said, you know, many of us have for years been saying MDLs are in some ways too ruleless in ways that we think have all sorts of unhappy consequences. And so, you know, when we see a draft rule for MDLs, everyone gets excited and thinks that's a great thing. But this particular rule, my question is, what problem is it trying to solve? Because none of the problems I've ever heard really anyone express, whether a plaintiff's lawyer, a defense lawyer, a party themselves, a judge, it doesn't seem to me that any of those problems would be solved by this rule. What this rule does is says here are some things -- I mean, I'm really talking about Subsection C. What this says is here are some things you might want to think about, and that's the way people will read it.

Here are some things that judges might think about, they might not think about. And doesn't provide anything that you would describe as standards for how to address any of these issues. So, you know, if it's -- you know, whether it's what we call early vetting, whether it's, you know, consolidated pleadings, it doesn't provide any guidance to the

judge or, more importantly from my perspective, the parties about what any of that means and what standards a judge should use. And in that sense, there is a real risk of, I think, an unintended consequence that a rule of this nature simply invites and encourages even more of the sort of ad hoc rulemaking that, you know, many of us find very troubling already in MDLs.

CHAIR ROSENBERG: Okay. Thank you so much. From our reporters?

PROF. BRADT: I guess I'll ask the same question I asked before, which is, doesn't Rule 16(c) already and has already for the last 40 years provided what you describe as ad hoc rulemaking in the rules? And are you suggesting that that rule is problematic? And I guess I'll ask the follow-up question already, which is, doesn't the list of things to consider make it more clear what may happen in an MDL to clients who don't have experience in it?

MR. STOFFELMAYR: So a couple things. A certain amount of ad hoc rulemaking has always gone on and always will. That's, yeah, absolutely. And Rule 16 I guess you could say contributes to that perhaps. That's fine. I mean, the rules are not written to address every situation. They are meant to allow a

certain amount of flexibility.

What concerns me about this draft is it takes a number of very controversial subjects, you know, consolidated pleadings, direct filing, things like that, it takes a number of very controversial subjects and says here is something for you to consider kind of making it up as you go. There's no standards, you know, no suggestion that the Rules Committee has come to any conclusions about whether these are proper or what they would look like, but it just says here's an opportunity to, you know, do your own thing.

And especially when it comes to these controversial topics, which is unlike regular Rule 16, that's a real -- there is a real risk that it invites, you know, an expansion of this kind of ad hoc rulemaking, which, like I said -- and MDLs are already, you know, sort of -- whether you like it or not, well, it's a defining -- it is for many people, I would say, a defining feature. And, you know, when you say there's a list of four things, does that help people to know what might happen in an MDL? Those four things are in the manual. They're in any number of best practices.

You know, nobody has trouble -- well, I

shouldn't say nobody. It's not hard to figure out things that might happen in an MDL. What's impossible to figure out is what will happen in an MDL. And a list of four, five, 10 things that might happen doesn't give you any better predictability about what actually will happen unless maybe you know who the judge is and that judge has a track record you can look at.

CHAIR ROSENBERG: Rick?

PROF. MARCUS: Well, I think I'm going to steal Judge Proctor's question. You think there should be a -- I think you think there should be a rule that calls for pretty immediate, let's say, individual scrutiny of individual claims, that's early vetting? Is that always true, even if there's an across-the-board objection to the legal foundation of all these claims, preemptions, whatever it may be?

MR. STOFFELMAYR: Absolutely 100 percent. There is no reason anyone should ever think it is in their interest, a good idea to file a claim if they have no idea if that claim --

PROF. MARCUS: Okay. So, if you're in the room with the client that Judge Proctor described, you are going to urge that client to spend large amounts of money for individual scrutiny of cases even though

there's an across-the-board legal argument that could put this all to an end?

MR. STOFFELMAYR: I don't know. I guess I don't understand the hypothetical because here we are in the current world. Okay. In the current world, I can say to the client, I am fairly confident that one day we will find out somewhere between 20 and 60 percent of these cases never should have been filed. There is no way for us to figure that out today. We will ask the judge for an order. We may or may not get it. We'll be told to negotiate, and we'll end up negotiating what will probably look like a fact sheet that will not address this issue. It'll give us names and addresses and things like that, but it won't address this issue.

In the meantime, let's file our preemption motion. I wish that I had ever seen a preemption motion that I felt like I could advise the client had an 80 percent chance of success, but it could happen, obviously. But, you know, we'll say, well, meantime, we'll file our preemption motion and if that gets granted, the case is over. If it doesn't get granted, you know, we'll slog along.

If the rule were amended, the anticipated effect, this was Mr. Dahl's point, is sitting in that

conference room, I would say there's nothing -- you know, it's nothing we have to do, but I'm pretty confident, like it or not, client, most of these cases probably are people who really were injured by your product. That's now, and we have a preemption motion, but we're not devoting enormous resources to anything. All we're saying is you need to provide this sort of information up-front. And if people have to do that, they won't file the cases where they can't, obviously, and, you know, there is nothing we need to do.

CHAIR ROSENBERG: Any further questions?

Judge Proctor?

JUDGE PROCTOR: There are cases where you have a dispositive motion and you ask the court to hold off discovery under rule -- until a 12(b)(6) motion's litigated, right?

MR. STOFFELMAYR: Sure.

JUDGE PROCTOR: That happens. Is there a rule, is there a current rule in Rule 16 that says the court must do that in every situation?

MR. STOFFELMAYR: No. Many judges don't in my experience. It's less a problem then.

JUDGE PROCTOR: So because -- and they may have reasons one way or the other for it, but what I'm wondering is you're asking for an individualized rule

in 16.1 and centralized proceedings that you don't even have present in Rule 16 in a single plaintiff versus a single defendant case, am I right?

MR. STOFFELMAYR: And the reason is we don't have this problem in single-plaintiff, two-plaintiff cases. If somebody sues my client and it's, you know, a plaintiff and a spouse with a derivative claim and they lay out and say, you know, here's exactly what happened in a complaint, you know, I used the medication, whatever it is, I got a prescription from Dr. So-and-So, I used the medication. Two weeks later, I had this adverse event and, you know, for such and such reasons, I believe your product was the reason for the adverse event.

I almost never am going to look at that and say, what are the odds they really had a prescription? What are the odds they really had a heart attack? It's never going to come up. The problem is a problem we have in multi -- you know, large multi-plaintiff cases where a hundred percent of the time I'm looking at a short form complaint probably or a long complaint that is a hundred percent boilerplate, uses the plaintiff's name once, and I'm looking at that and I'm saying there is probably a 20 to 50 percent chance this person never had a heart attack, but we may never

find that. It's a completely different kind of case the way that it's evolved.

JUDGE PROCTOR: So give me your three top ad hoc rules that MDL transferee judges implement that you would say we should address.

MR. STOFFELMAYR: With an actual rule -- I mean with a --

JUDGE PROCTOR: Yeah. Well, you've said the problem --

MR. STOFFELMAYR: Yeah.

JUDGE PROCTOR: In your submission, you said one of the problems this rule is going to foster and permit and allow to continue is ad hoc rulemaking by transferee judges. Give me your best three examples of that.

MR. STOFFELMAYR: So, I mean, the one we've all been talking about, a rule, you know, fact sheets plus, something that actually had the effect on people, that there is an expectation that you can't file this this case if you can't provide enough evidence to show that there is some there there. That would be one.

Two, consolidated pleadings. Nobody today knows what -- we see them all the time. No one can tell you ahead of time for sure what are these and

what legal effect do they have. I would love a rule that said either no pleadings other than those recognized in Rule 7 or said, in addition to the pleadings allowed in Rule 7, these two, three, four pleadings and explained what legal effect they have.

JUDGE PROCTOR: Can you repeat that last one again, please?

MR. STOFFELMAYR: Sure. I said I would love a rule that either said there will be no pleadings other than those allowed by Rule 7 and explained whether a master complaint is or isn't a complaint for purposes of Rule 7, I guess, because nobody, you know, I think, knows the answer to that question. So either said there's no such thing as master complaints, short form complaints, there's just Rule 7, or alternatively, a rule that said, in addition to the pleadings allowed by Rule 7, here are two, three, four, you know, additional types of pleadings, maybe a master complaint would be one, maybe a short form complaint, a master answer, you know, so it's parallel and explained what the force of those pleadings is, you know, what legal effect does the master complaint have because, right now, in different cases, it can mean something very different. It can simply be an administrative device. It might be a binding pleading

that everyone is tied to. You might be able to file a motion to dismiss it. You might not be. That would be a rule that, you know, everyone can read ahead of time and know what that means rather than each judge will sort of start fresh.

And you asked for three. Direct filing is the other one that I think is a source of huge confusion. And there is a sense among some judges anyway that, you know, defendants, come on, you've got to agree to this, you know, don't be difficult. What's the big deal? This saves everybody a lot of problems.

JUDGE PROCTOR: There's a rule that permits you to object to that, the venue rules, in personam jurisdiction rules, so I don't understand that. Direct filing only comes into play when both sides agree to it or else there's a litigated issue about whether direct filing is appropriate. Unlike our Criminal Rules of Procedure, in the Civil Rules, the parties can agree to anything they want if the court permits it, so I'm at a loss to understand why the direct filing has gotten so much traction on your side.

MR. STOFFELMAYR: Because there are agreements and then there are, you know, we better

agree to this or bad things are going to happen, because I have a case where the judge ordered us to waive service. That's the opposite of a waiver if you're ordered to do it. Now fine, nobody cares, everybody was going to waive service anyway. So, obviously, it doesn't get litigated. But there is a dynamic in these cases where everyone is expected to kind of do what the judge wants on something like that, and at the beginning, at the outset, who wants to pick a fight over direct filing, because you're thinking how much difference does it really make.

PROF. MARCUS: So you think a rule should say judges must not do -- accept direct filing, even if the parties accept it?

MR. STOFFELMAYR: Again, I mean, my -- I think someone else can address whether direct filing is a good or a bad thing. My point is we would all be better off if we had a rule on direct filing. The rule might say it is always permissible and when it happens, here is the impact on choice of law questions, here's the impact on statutes of limitations, depending on the jurisdiction, may or may not follow substantive choice of law principles, here is the impact on personal jurisdiction arguments, et cetera, et cetera.

You know, if the Committee concludes that direct filing, you know, is a good thing, we need a rule that explains what it is and how it works and what the consequences are rather than the parties being told draft a direct filing order and I'll sign it.

PROF. MARCUS: And so that rule ought to handcuff the judge to do anything different.

MR. STOFFELMAYR: I'm not a -- I mean, so maybe this is an unpopular view in this room, but I don't think that's always a bad thing. But most rules are written with a certain amount of discretion, right? And I think, in my comment, I never really focused on this before, I always sort of thought that if someone doesn't serve timely, you know, the judge kind of always let it go. It's actually really interesting. If you read I guess it's Rule 3(m), there are a lot of guardrails around what a judge can and can't do when someone didn't file a -- didn't serve a complaint on time. Virtually all of the rules work that way. So I don't know that, you know, when I say we need a rule that that rule would have to be any more of a straitjacket than virtually all of the other rules or handcuffs to use your term.

CHAIR ROSENBERG: Okay. Thank you so much.

Are you going to be staying? Are you staying for the duration of the day?

MR. STOFFELMAYR: I was going to stay until 3 or 4 if that's okay.

CHAIR ROSENBERG: Okay. Okay. No, that sounds good. If we have some additional questions, we have time at the end, I know we'd be anxious to ask you. Thank you so much for your presentation. We appreciate it.

Next, we're going to move to Mr. Beisner, who is appearing remotely. We see him on the screen, and you may proceed, Mr. Beisner. You're here to talk about 16.1. And you're on mute right now. Let's see if -- frozen and muted. Have we unmuted everybody for purposes of being able to speak? Yeah. There's an issue with his connection? Okay.

So I think, Mr. Beisner, if you can hear us and given that we're a little off schedule, but we knew that, so that was all planned, we're going to take -- you want to take -- we'll take our break now, our 10-minute break. This way, Mr. Beisner, we can work on making sure the technology works when we return from the break. So it's 11:17. We'll be back at 11:27. We'll begin with Mr. Beisner and then we'll go to Mr. Redgrave. Thank you.

(Whereupon, a brief recess was taken.)

CHAIR ROSENBERG: To get started now, did we work out our technology issues?

MR. BEISNER: I believe we did.

CHAIR ROSENBERG: Okay. So just sit tight, Mr. Beisner, we can hear you, see you. I'm just waiting for everybody to be seated, and we will get going, so just give us a minute or so.

MR. BEISNER: And to be clear, the technology issues were all of my making.

CHAIR ROSENBERG: The record so reflects.

MR. BEISNER: Yes, blame me.

CHAIR ROSENBERG: Okay. All right, Mr. Beisner, let's have you proceed. And I think we'll give you the one-minute warning, but you'll monitor yourself as well.

MR. BEISNER: Okay. Thank you for the opportunity to appear before the Committee today to provide comments on the proposed rule, 16.1. I apologize for not appearing in person, but, unfortunately, circumstances required me to be away from Washington today. My comments this morning are limited to one element of the proposed rule, that's Subsection 16(c)(1), which would prompt courts and parties to consider at the initial MDL status

conference the question, quoting the rule, proposed rule, whether leadership counsel should be appointed.

In recent years, the MDL leadership counsel concept has undergone substantial change. Not long ago, MDL plaintiffs' counsel simply organized themselves and courts essentially confirmed their plans, sometimes subject to adjustments. For example, I recall that when the HMO MDL was commenced in the Southern District of Florida back in 2000, there was a well-publicized spat among plaintiffs' counsel about who should take the lead role. At the initial status conference, counsel asked Judge Moreno for two weeks to sort out their differences. The court reluctantly agreed but with an admonition that if counsel couldn't agree on a leadership plan, the court would make the picks.

In more recent years, we've migrated toward transferee courts taking applications for lead counsel roles and making selections without much, if any, input from plaintiffs or their counsel. But partly as a result of that evolution, I think the leadership counsel concept has become rather muddled. In a 2020 Law Review article, Rutgers Law Professor David Noll examined the counsel leadership orders from over 200 MDL proceedings. He concluded that while the lead

counsel notion is among many ad hoc MDL improvisations, counsel leadership orders, as he put it, constitute the most extreme level of ad hocery in the MDL realm. By the professor's reckoning, the contents of counsel leadership orders vary widely. And, to me, that raises a question whether we should be dropping into our federal procedural rules a concept that's seemingly so ill-defined.

Perhaps the greater concern, however, should be the myriad judicial authority and ethical questions raised by counsel leadership orders. Those orders typically designate a few lawyers to run an MDL proceeding on behalf of all the plaintiffs therein. Thus, without anyone's consent, the counsel actually hired by most individual plaintiffs are more or less replaced with different attorneys picked by the MDL court. According to Professor Noll, this sidelining of non-leadership counsel is explicit in 22 percent of the counsel leadership orders he reviewed.

For example, one order states, and I'm quoting now, "Counsel for plaintiffs who disagree with lead counsel or who have individual or divergent positions may not act separately on behalf of their clients without prior authorization of this court." Other leadership orders are less explicit, but they

generally make clear that the court-appointed attorneys are running the show and imply that non-leadership counsel may not represent their clients in the manner that they normally would.

The source of an MDL court's authority to essentially override plaintiffs' choice of counsel in this matter is far from clear. Some suggest the authority exists because a mass tort proceeding resembles a class action in which lead counsel are normally appointed under Rule 23(g).

But our appellate courts see it differently. In its Fosamax decision several years ago, for example, the Third Circuit stated that in mass tort proceedings, plaintiffs each retain the right to develop their own cases because, and I'm quoting now, "A mass tort MDL is not a class action but rather a collection of separate lawsuits coordinated for pretrial proceedings."

This concern is heightened by the fact that some MDL courts have ruled that the court-appointed lead counsel do not owe standard fiduciary duties to plaintiffs in an MDL proceeding with whom they do not have a formal retention agreement. That presumably means that lead counsel are not obtaining informed consents from such plaintiffs regarding key strategic

decisions, and it's unclear who should be conferring with such plaintiffs about their claims when their retained counsel have essentially been barred from active participation in the litigation.

Because of these concerns, I fear that counsel leadership orders being issued in some MDL proceedings could be challenged by plaintiffs dissatisfied with the outcomes they obtain. And with that in mind, I respectfully submit that before we enshrine the MDL leadership counsel concept in our federal rules, it would be prudent to develop a stronger consensus about how that concept should be defined and about how to craft leadership orders to ensure that they neither exceed judicial authority nor infringe on plaintiffs' individual due process rights.

CHAIR ROSENBERG: Thank you, Mr. Beisner.

From our reporters? Rick?

PROF. MARCUS: John, thank you very much. This is Rick Marcus. I am assuming that you would agree with the notion that having a thousand lawyers doing a thousand things that they each individually want to do is inconsistent with the 1407(a) objective of structured, orderly pretrial proceedings.

MR. BEISNER: Yeah. I do not want to be heard to say there should not be leadership counsel in

MDL proceedings. I agree that would be a nightmare, but I think that the shift away from -- and there are reasons why this happened that are valid, but I think the shift away from counsel sort of selecting their own leadership, there being a participation in that, to the court sort of stepping in and saying these are going to be leadership counsel to the exclusion of the active role of other counsel is where the problem comes and I think probably needs some softening.

PROF. MARCUS: John, just a footnote on that. Do you recall the fine paper controversy in the early 1980s concerning that class action leadership Tammany Hall situation as was described? You're saying the court should not have the major role, but rather, the organizational and political skills of the plaintiffs' bar should be determinative?

MR. BEISNER: No, I'm not saying that at all. And that's why I'm saying the move away from the total self-selection is a sound basis. I think there were abuses under that approach as well. But I think there's a happy medium that could be struck under which there is more participation by counsel in selecting. The notes do not say anything about consulting with the plaintiffs in the proceeding or with the counsel who are not aspiring to be non --

that are not aspiring to be leadership counsel.

And there is that specific provision in the rule itself that talks about, you know, should there be some restriction on the participation of non-leadership counsel in the proceeding. I think all those sorts of things are going to invite challenges from plaintiffs who don't like the outcome of these cases and, you know, perhaps upset the applecart after people have invested a lot of time in these MDL proceedings.

CHAIR ROSENBERG: Andrew?

PROF. BRADT: Thanks. Thank you. Thank you for being here. I just want to clarify the link between what you described as the changes in appointment of leadership counsel and reduced input by those who aren't in leadership. It would seem to me it would be the reverse, that if leadership is organizing themselves as a slate and presenting it to the judge with a rubber stamp, then that would be more exclusive to the other attorneys in the case than what you're describing now. I guess I just don't see the linkage between the change in practice and the problems you're identifying.

MR. BEISNER: I think what happened before in a lot of cases is there were multiple slates

presented, different people offered candidacy, and there was a lot more consultation by the courts about who is supporting whom. I agree with you that there probably is need for greater court involvement in that process, and I'm not returning to those days where the biggest person in the room in terms of power and political might is selected. I think the court needs to look out for that. But I think there are ways to soften this process so that the court is open to input from the counsel about who they would like to see in these leadership roles, and that's not contemplated by the current draft.

CHAIR ROSENBERG: Judge Proctor?

JUDGE PROCTOR: Hello, John. A question. What should we make of the fact that most leadership appointments are on the plaintiffs' side and we're hearing this from defense counsel generally, not plaintiffs' counsel?

MR. BEISNER: Yeah. And the reason that you're hearing from me on that is I am fearful that we as defendants could go through MDL proceedings, have the results that we like, and then have plaintiffs' counsel turn around and say, I was denied my due process in that proceeding because my counsel was sent to the bench, didn't participate, was not able to

participate in a particular strategy decision that resulted in an adverse ruling. Or, when we get cases remanded in the discovery process, you could have people say, well, my attorney wasn't able to participate in that and so discovery decisions that were made by the MDL court should be ignored because, now that we're remanded, we want to do it differently.

I think that's the reason I'm here making those concerns, raising those concerns. And, indeed, you know, let me be very specific about this, and, Judge Proctor, this kind of goes to the question that you raised earlier as well. You know, in the Fosamax case that I mentioned, which was a preemption case and it ultimately went to the Supreme Court and the Third Circuit's decision was vacated in that case, but one of the arguments there was that not enough attention was given to the individual claims in that case with respect to the preemption motion and that the sweeping ruling that the court issued was therefore improper.

And so this -- the sort of challenge I'm talking about, although it was a little bit different there, was made in that case and was accepted by the Third Circuit, and so that's why I'm concerned, because there was a bit of a challenge to the lead counsel not giving adequate attention to the

individual claims.

Judge Proctor, going back to another issue that you raised earlier about I think when Mr. Dahl was up before then, I know I'm off topic here, but I'd also note that case, I think, gets at the reason why you need to look at claims individually even where you have a sweeping motion, because there, you know, the court was was critical of the lack of information about the individual claims and, you know, it said you need to look at these claims individually. They need to be accounted for in that way.

And if you look at the recent rulings of the Third Circuit, the Sixth Circuit, and so on, you know, I think they really stress the notion that these claims, under the MDL statute, must be viewed as individual claims, must be treated as such. And, you know, this notion that you kind of go to this sweeping motion first without doing anything else, I think these cases really undermine that proposition.

JUDGE PROCTOR: Going back to your original point, though, of lack of due process, doesn't the fact that the rule permits the parties to submit a report about counsel's selection or counsel leadership and on top of that is agnostic on how the leadership structure should look, doesn't that create more

opportunities for there to be a tailored solution for each case in terms of selection of leadership?

MR. BEISNER: I guess I didn't recognize that in there. As I read it, it talks about the court consulting with recommendations of other judges and so on, but there really isn't a clear -- and maybe I just missed it, but there isn't a clear idea that the court should confer in some manner or consult in some manner with counsel who have decided to play a back-bencher role in the proceeding.

JUDGE PROCTOR: Well, 16(c) says, in preparing a report for the conference, transferee courts should order the parties to meet and confer or meet and prepare a report to be submitted to the court before the conference begins, and that's one of the subjects in the report, is whether leadership counsel should be appointed and, if so, how.

MR. BEISNER: Understood. I'm talking about the actual selection of the counsel, though. I see what you're saying is that they can propose a mechanism for that, but there's certainly nothing in the notes that encourage a court in making its appointments to be conferring with the parties' counsel.

CHAIR ROSENBERG: Andrew? Or, no, nothing?

PROF. BRADT: I return it to you.

CHAIR ROSENBERG: Okay. Okay. All right. Mr. Beisner, thank you so much. As always, very helpful comments and we appreciate it.

We'll move on now to Mr. Redgrave, who also is appearing remotely, and he's going to address privilege logs.

MR. REDGRAVE: Good morning. Are you able to see and hear me?

CHAIR ROSENBERG: We can.

MR. REDGRAVE: Excellent. I appreciate the opportunity to appear remotely. I apologize I could not myself be in D.C. for the meeting in person. But I want to kind of cut to the chase on the privilege log. And, again, appreciate the efforts of the Committee to work through the issue. You've obviously received a couple submissions that I have made, along with Judge Facciola, a retired magistrate judge from the District of Columbia.

I think, to focus my remarks, I'm going to go first to a question Professor Marcus asked to Mr. Keeling that was kind of going to the cost, complexities, and issues here, and I wanted to note two things. First, there is a significant level of nuance and inquiry required. Obviously, when you do a

document-by-document log, that detail that you have to do for every entry and the QC and everything else, it's enormous. But doing any level of logging, of course, is expensive and deeply, you know, vexing in some ways for those of us that do it a lot.

But I think the reality is modern practice really requires us to have a rule that kind of matches better the reality and doesn't create pitfalls for those in different jurisdictions or in locations where people aren't aware of best practices or aren't following them, and that's the reason for urging a rule change. And I would say that what the Committee has put forward is very much an important set of changes in terms of the Rule 26 conference and the Rule 16 conference, but more is necessary with respect to an actual change to 26(b)(5), and I'll get to that.

But the burdens that are involved, the complexities, you have multiple privileges, including not just the attorney-client and the attorney work product consideration, you can have the spousal. I was looking at that, just a case in the Southern District for a Rule 45 subpoena. You can have joint defense considerations, common interest considerations. There's just a lot there. Then you've got get waiver, privilege breakers and the

rest. So getting an early conference as the Rules Committee suggests and what we suggested in our proposal is important because it kind of tees up what cases are going to have more complex issues and what cases can you actually dispense with issues.

But the second thing I want to make a point here is that it's not just a big case or two. You talk about large expenses on privilege logs even in small cases, which is actually a greater impact on proportionality of the cases, which is why I think a holistic change in the rule, including a Rule 26(b)(5) change, is important so that those cases can benefit because, while maybe a large company can be very dissatisfied with a disproportionate impact, which is wasteful, and I think we all agree we don't want that for any parties, if in a small case you're spending a disproportionate amount, that could be a gate-closing impact, in other words, really impacting the availability of the courts to smaller cases if that party gets swamped by some sort of burden on privilege.

The second point I want to just jump to, as Judge Jordan I believe it was asked Mr. Keeling in the context of why we need a rule, I will stand by what Judge Facciola and I submitted that the changes to the

meet-and-confer and the conference rules are not enough. 26(b)(5) itself is really the source of kind of the de facto standard of document-by-document whether we like it or not.

I was just reading a case from the Northern District of Illinois from August 11 and the court there, in resolving an issue on an interrogatory points to and you've got to comply with 26(b)(5) footnote to cases from 1987 and thereafter, all about you have to go statement by statement, document by document, just boom, done.

I did an informal poll at a recent conference with people that served as clerks, and I asked them what their experience was with the rules and Advisory Committee notes and I know this group will probably be sad to know that most parties cite to the rules, not the Advisory Committee notes. Not that many people are geeks like me that read every single Advisory Committee note upside down and backwards. And I think we have to realize that when we can have the balance between what's in a note and what's in the rule. And I think, here, the rules package is incomplete if we don't address the actual 26(b)(5). We, meaning Judge Facciola and I, did submit some proposed language. I won't pretend that that's the

best language. I used the word "accord" in the drafting, not pursuant to, but the Lawyers for Civil Justice submission also picked up on that.

I do submit that what we tried to do in that proposal that we put forth on January 31 of this year is to create something that's just neutral but gets it in the rule and not just the Advisory Committee note. And I'll say one of the salient benefits could be, if the Committee were to go down that route and do that simple change, that same change could then be implemented in Rule 45.

And I will note that the Lawyers for Civil Justice's October 4 submission pointed out that Rule 45 is kind of untouched, and that's a critical component because the non-party subpoena recipients aren't necessarily in the meet-and-confers or anything else, but they should get the benefit of the same level of proportionality and reasonableness being applied to what they have to log and how they have to log it and when. So I'd submit, if the same change was made to Rule 45 as it relates to the same language for Section (b)(5) on the logging, that could really knock that out in an efficient way.

The third thing I wanted to raise is Ariana Tadler raised a question, I think, to Mr. McNamara

with respect to 502(d) orders. I simply have to report that in a very major significant matter that I'm involved in right now, well-known plaintiffs firms, a multiple of them, all refused to agree to a 502(d) order, one to put the party to the test on the other side to have to go through all the traps of 502(d), really taking away any possible safety net. The judge refused. Well, the judge agreed with the plaintiffs and entered their order and so no protection there in a world where it's not really mandatory.

And even if you do have a 502(d) order, I will submit that that doesn't really address the potential challenges in the excessive costs and really pointlessness of logging things where people could agree up-front.

Now the fourth point I want to make, and this is kind of teeing off of Mr. McNamara's comments, which I thought were very good, back to the need to have issues addressed up-front and the value of that, that mirrors what Judge Facciola and I submitted. But I think one of the things that's teased out of the Lawyers for Civil Justice submission and Mr. Keeling's testimony that I'd like to tie into is the concept of rolling, and that's the language that the Committee

used in the proposed draft Committee note.

I think that's not quite getting to what you need because rolling has a unfortunate meaning that people are like, well, it just means you have a log that trails or just all the production is rolling, you're just going. It's like no, it's more it's a deeper meaning. Judge Facciola and I submitted that it's a tiered or a phased concept that just like Mr. McNamara said, if you can get some key issues on privilege addressed at the front end, like are we dealing with a situation where someone's going to claim there's a waiver? I mean, someone's going to raise a crime-fraud argument? Is someone going to -- you know, we don't really need to log anything after the complaint was filed or after a particular event in the past, all sorts of things -- or you know what?

We will agree that there are people in your law department that are all litigation-related, they don't have two hats. We get it, don't even log anything going to them. Or you could say that if it's a direct communication versus CC's, treat them differently. Let's talk about that up-front conceptually, but then we have to have an iteration, a continued dialogue as perhaps other things come up in in the litigation.

So I think that's what the Committee was getting at to front issues early when you can, but then also, and this is reflected in the January submission Judge Facciola and I put forward, is we have to recognize it is evolution, things will happen, so we don't have a one and done, you've got to come up at the front of the case with all the issues. So I recognize that's a little bit of a nuance there, but I think the Committee's onto the right idea. I think that the word "rolling" is the problem, I should say.

CHAIR ROSENBERG: Mr. Redgrave, let me interrupt just for a moment to see if we have any questions from our reporters, from Rick, from Andrew, any of our Committee members?

(No response.)

CHAIR ROSENBERG: Okay. So, Mr. Redgrave, we have no questions, so did you want to finish your thought?

MR. REDGRAVE: No, I apologize for that. That was really at the end of it because I think I was trying to just kind of touch on the issues. I don't want to repeat what others said or what we had in the written submissions. I will say that Judge Facciola and I are considering a final sort of note on this since both of us have kind of been like tilting at a

windmill of privilege logs for 20 years or so together. We really do believe that there's a need for better practice across the country and with uniformity, again, to mend where you've gone.

I see what the Committee did with respect to truncation of the Rule Committee notes. I think the biggest thing here is we really believe two things, or I should say I should really believe because I'm speaking here by myself.

The Rule 45 point is something that we missed, we didn't put in there, I think it should be addressed, that non-parties all must show up if they're having to do privilege logging. It needs to be proportional and we need to watch for what's proposed by the non-parties and assess, number one.

Number two, we really need to have the rule change in 26(b)(5)(A). The submission we had, I think, is on point, and I think the law, the experience that people talk about later today ties in with that.

And then the third thing is this, you know, in the Committee note on rolling, if that can be adjusted to better reflect the concept, as I explained earlier. But, other than that, I don't want to drone on. I appreciate what the Committee has done on the

privilege logging rule and am very, very happy with the process but would urge that we go a little further.

CHAIR ROSENBERG: All right. Thank you so much, Mr. Redgrave.

Oh, Judge Bates?

JUDGE BATES: I just have one question that may be borne of ignorance in terms of the difference between rolling and tiered. Would rolling allow for production of documents and logging before all the documents have been reviewed for privilege purposes, whereas tiered by categories, would that require that you have finished the review of all documents so you know what fits in that category and whether you're claiming privilege?

MR. REDGRAVE: Appreciate the question. It would not necessarily mean that because you can have a tiering as a concept, as an agreement as to what issues are more important, which ones will be fronted, do you want to have certain individuals or certain issues, you know, addressed earlier, like I mentioned, if there's some allegation of crime-fraud, for instance. But that's kind of a unique situation.

But there could be some issues where someone says, you know, all the work that these lawyers were

doing were really business hat, not lawyer hat. It's not legal advice, can you -- you know, let's talk about that first. And then you have some sample documents to go to a judge to say, you know, call balls and strikes, and that'll guide what the rest of the logging will be.

So the concern I have with rolling, and this will put it better in context, I hope, is that in the nomenclature of most discovery folks, rolling is just like, okay, we need a rolling production, don't wait until you have all the documents, you know, gathered until you start producing and you haven't reviewed it all until you start producing and, by the same token, when you have the privilege logs trail that, so they're rolling too.

That is just a mechanical kind of concept, and I'm afraid that that would kind of miss the point that I think the Committee and others are endorsing here, and that is do it as a tiered or a phased, but that doesn't mean that you have to, you know, wait for everything to be concluded either because you should be able to intellectually separate the issues, advance things for consideration, and even get additional guidance on some sticky privilege issues, like which particular law, especially if you have foreign

privileges involved. I mean, so there's a lot of things here where early judicial involvement can be very helpful, and that's the point, I think, that needs to be driven home.

CHAIR ROSENBERG: Okay. Thank you so much.

And, next, we'll hear from Mr. Campbell on 16.1.

MR. CAMPBELL: Thank you, Judge Rosenberg.

CHAIR ROSENBERG: Good morning.

MR. CAMPBELL: Good morning to the Committee. Thank you for letting me speak. My name is Chris Campbell.

CHAIR ROSENBERG: Oh, do you have your mic on? Green light.

MR. CAMPBELL: Where's the green light?

CHAIR ROSENBERG: There you go. Thanks.

MR. CAMPBELL: My name is Chris Campbell. I am a partner at DLA Piper, where I'm the chair of the product liability and mass torts group at the firm. I have two points to make. First is to applaud the Committee for putting forward a rule on MDLs where they are badly needed. My second point is to reduce my applause to a very polite golf clap for Rule 16.1, which seems to do very little.

With regard to my first point, MDLs lack

structure today. They lack predictability. And, particularly important, they lack accessibility. Put yourselves in the shoes of a young lawyer who is new to MDLs. There are very little places they can go to find out how an MDL proceeds given all this variability. There are no local rules. There's not even really Westlaw that can provide guidance. The best resource a young lawyer has is probably an older lawyer who can sort of pass down the process of an MDL to that younger lawyer in the way that people handed down word-of-mouth information back when we were living in caves.

We can do better than this. I think Rule 16.1, unfortunately, is not doing better. It is a weak and frail and feeble rule. It is more of a suggestion than a rule. And I would submit that by basically not requiring anything it promotes the rulelessness of MDLs. It also has some specific challenges that I would highlight for the Committee.

First of all, because you've set out now a specific rule, 16.1 on MDLs, it raises the question, are all the other rules not applicable to MDLs? And, as you've heard from other members today, other witnesses, that is a problem. It seems to be very inconsistent whether the other rules are applied in an

MDL setting or not.

And I think Rule 16.1 misses a crucial opportunity to highlight what Judge Proctor was mentioning earlier, which are those key moments where an MDL can actually find a dispositive issue early on in a case and address that dispositive issue early before the parties have engaged in extensive discovery that may be unrelated and to really decide if that issue allows the case to go forward or not.

Judge Rosenberg, you've done that effectively yourself in the Zantac MDL, and others have certainly done it as well.

And, thirdly, I think 16.1 promotes MDL esoterica, some of it which is controversial. Things like the leadership counsel that Mr. Beisner talked about is built into the rule, the concept of putting forward special masters, which is a little bit controversial, I would suggest in MDLs, and the reference to early settlement talks, which are also in the new proposed rule.

So, again, while I applaud the effort to put forward a rule, we certainly need rules in the MDL side of things, this doesn't seem to do it. And my applause diminishes to sort of a tepid applause for Rule 16.1. Those are my comments. Thank you very

much.

CHAIR ROSENBERG: Okay. Thank you so much.

Rick or Andrew? Ed? Any of our Committee members? Okay, Andrew has a question.

Professor Bradt?

PROF. BRADT: I have a question, and it relates to your written submission rather than to your comments here today, but one of the things that you suggest shouldn't be enshrined in the rules, direct filing stipulations, and in that, you say it conflicts with Rule 3 and the MDL statute. I'm just interested in how direct filing stipulations violate Rule 3 or the MDL statute.

MR. CAMPBELL: So I would certainly defer to others to talk more in more detail about direct filing. I think, from my perspective, what I'm hoping to avoid in the MDL setting is the inconsistency of allowing direct filing or not allowing it. And the fact that practitioners aren't really clear on that going in, that's the issue that I would raise.

PROF. MARCUS: How does one forbid it?

MR. CAMPBELL: How does one forbid direct filing, Professor?

PROF. MARCUS: Well, if a plaintiff files in the MDL transferee court and the defendant does not

object, that's a direct filing, right?

MR. CAMPBELL: Right.

PROF. MARCUS: So would you say that should be forbidden by rule?

MR. CAMPBELL: I'm more concerned that there be a specific rule that governs the issue than the content of that specific rule. My message here is really that rules are important. They provide a baseline, they provide a default to all the practitioners, and, to me, it's more important that they exist than the specific content, and direct filing would be one where I would probably defer on that.

CHAIR ROSENBERG: Judge Proctor?

JUDGE PROCTOR: Are you familiar with any multidistrict litigation of any size where leadership counsel was not appointed?

MR. CAMPBELL: No.

JUDGE PROCTOR: That's a reality that we deal with on a day-in, day-out basis. I've heard not just you but others say we're enshrining the practice when we mention it as something that the transferee judge should receive a report about and discuss with the parties. But it seems to me it's just a reality. And it's a prompt for the transferee judge to discuss

with the parties whether and it doesn't presume -- the rule does not -- the draft rule does not presume leadership counsel be appointed, but it also creates the opportunity to discuss how that appointment process should look. What is the evil of that?

MR. CAMPBELL: I don't think there's an evil. There's no evil to it. And I think I would really raise the same issues that Mr. Beisner raised, which are we need a clear process governing how leadership are appointed. I think the current draft of the rule references to non-leadership attorneys having limited roles, which I question whether that's something that is really fair and viable or not.

JUDGE PROCTOR: Are you familiar with any sizable MDL where non-leadership counsel have the same role as leadership counsel? It just wouldn't work, would it?

MR. CAMPBELL: It would work, but it just strikes me as something that needs to be clarified and I think addressed and also building in the concept of how the actual plaintiffs' lawyers work together and do this organically on their own. I think that all has to be built into the process. And it doesn't feel to me like that has been done in the current rule.

CHAIR ROSENBERG: Andrew?

PROF. BRADT: Thanks. And I don't want to sound like a broken record on this, but you discussed the concern about enshrining judicial involvement in facilitating settlement as one of the things that shouldn't be in the rule. But, of course, that's already in Rule 16.

MR. CAMPBELL: Correct.

PROF. BRADT: And Rule 16.1 mirrors that language. So isn't any enshrinement concern effectively non-unique in the sense that it's already there?

MR. CAMPBELL: That's the one question I predicted I would get, so I'm so glad you asked that. Thank you. So I think what I would say is I think it's fine that it's there as a concept, but I think the corollary concept should be there as well, which is the early dispositive issue Judge Proctor raised. I think that has to be in there. You could argue that that's there in (c)(7), but it really just says legal and factual issues. I think I think there should actually be a specific call out for early dispositive issues, such as general causation, preemption, and others that many on this Committee are aware of. I just think that has to be balanced against the settlement issue.

PROF. MARCUS: So settlement discussions should be forbidden by rule until those other decisions are made?

MR. CAMPBELL: I'm not saying that at all. I'm saying, if you're giving a laundry list of topics, I think that settlement has to be balanced with the early dispositive motion idea.

CHAIR ROSENBERG: Okay. Thank you so much. We appreciate your comments.

Mr. Shepherd will now address 16.1 as well.

Welcome.

MR. SHEPHERD: Thanks. My name is James Shepherd. Thank you for the opportunity to speak today. I'm a partner at the law firm of Shook, Hardy & Bacon in Houston, Texas. I'm a trial lawyer with over 20 years experience in MDLs. I'm currently serving as national counsel in my sixth product liability MDL. I've been in the trenches in MDLs my entire career. I've personally witnessed the inefficiencies that exist in MDLs because of chaos that's caused by meritless claims.

I've designed and executed strategies that have resulted in the dismissal of thousands of these meritless claims, and I'm here to tell you that we need a better way, and, as currently drafted, Rule

16.1 is not it. Legal scholars have appropriately cited, and you guys have heard it many, many times, the *Field of Dreams* axiom, if you will build it, they will come when describing MDLs.

PROF. MARCUS: Do you have statistical data concerning the proportion of claims that are groundless? You mentioned dismissal or something of thousands in your experience. Where is the data on that?

MR. SHEPHERD: Well, I mean the data is in the dismissals that happened. I will talk to some specific numbers in one of the MDLs as an example in my comments. And then, obviously, for the MDLs that I have been involved with, I can provide numbers of cases that have been dismissed that were meritless going back to the Bay Call MDL, which was the first one I did in the early 2000s.

The axiom from the *Field of Dreams* is apropos when it comes to meritless claims and MDLs, and your judges are essentially powerless to do anything about it. Safeguards that normally exist to prevent meritless claims often are just not practical in MDLs. Judges don't have the time or the resources to deal with hundreds or thousands of Rule 12(b)(6) motions in an MDL. Consequently, what you have is

attorneys who often in a -- it's a callous moneygrab is what it is, file legally insufficient claims, many of which omit basic information that's required to establish that the plaintiff actually used the product at issue -- I'm a products lawyer, so I'm talking about products -- and/or suffered the alleged injury.

As you know, the MDL Subcommittee has observed that judges and litigators agree on this point. These meritless cases and claims --

PROF. MARCUS: I think I wrote what you just referred to, and I think we ought to reserve judgment on whether the plaintiffs and the defendants agree on those points. We may hear from some plaintiff lawyers who don't.

MR. SHEPHERD: Sure. But the agenda book on the Advisory Committee states, "A significant number of claimants, ultimately, often at the settlement stage, drafts have unsupportable claims, either because the claimant did not use the product involved or because the claimant did not suffer injury." Right?

And I think -- I know that there are plaintiff attorneys that agree with that because I deal with them all the time on the PSC, and when it comes time to deal with the end of an MDL, those

attorneys do not like having to deal with meritless claims either. It's very difficult for them to make them go away and to end the MDL.

CHAIR ROSENBERG: Judge Proctor has a question.

MR. SHEPHERD: Sure.

JUDGE PROCTOR: And I think you just hit on what I think the constant friction and rub in all this is: you want a rule that would have these meritless claims identified at the settlement process.

MR. SHEPHERD: Before the settlement process, I'd like it to happen very early.

JUDGE PROCTOR: Okay. Before the settlement process, exactly.

MR. SHEPHERD: Right. Yes.

JUDGE PROCTOR: Because you think that would help with settlement discussions to know what -- but the problem is it seems to me that that makes sense in some cases but not every case. And the fact of the matter is there may not ever be cases -- there may be cases where there's not going to be a settlement process because the defendant or the plaintiffs are so far apart on valuing the claims or because of some protected golden holy grail of a product.

We can't build a rule and force lawyers and

judges to engage in a practice every time when there makes no sense to engage in the practice every time. And so what I would say is it is a complete fabrication to say that MDLs do not permit termination of meritless claims. The process -- that's built into the process. It may be later when settlement discussions occur or when the lawyers want to have settlement discussions or their clients.

But the point is there are terminating points in every MDL for meritless claims, 12(b)(6) when we get to that, Rule 56 when we get to that, on remand sometimes when those things are reached, but when you have centralized proceedings, the transferee judge is not worried about whether 5 percent of the trees are dead. The transferee judge has to be concerned with moving the forest along, right?

MR. SHEPHERD: Well, obviously, the transferee judge does have to move the forest along. I don't think there is ever a time where allowing the meritless cases -- in a product setting, a case where a plaintiff cannot give a shred of evidence that they used the product or that they suffered the injury, I can't imagine a situation in which the judicial system, the MDL process, the transferee court would want those cases pending.

JUDGE PROCTOR: We don't, but there are points when we get to deal with those. But the point that I think you're -- and I think you've been the most candid on this, and that is you want it dealt with by the time you begin settlement discussions, and that's not always practicable.

MR. SHEPHERD: I mean, I do, but that's not the only time. I mean, these cases have -- they create chaos. I mean, chaos is the word. Throughout the process, starting from day one, there are filings. There's paper. There's things that the judges and the parties have to look at. In the Mirena MDL, it was in the Southern District of New York, it was Cathy Seibel was the judge, great judge, by the way. We had a case management conference every month for three years. These conferences lasted at least two hours, sometimes they would go a half a day. We dealt with substantial issues that were brought about by meritless cases in every single one of those case management conferences for years.

We shouldn't have to do it. It would be so much easier for the court and for the parties, but really for the court, if there were thousands of cases that just weren't in the system that shouldn't be there, that just shouldn't be there.

CHAIR ROSENBERG: Judge Jordan has a question.

MR. SHEPHERD: Sure.

JUDGE JORDAN: Yeah. I'd like to get you to focus on the practicability point that was made by Judge Proctor's question, and this has come up in the testimony of several people.

MR. SHEPHERD: Sure.

JUDGE JORDAN: I know you don't speak for everybody. but take a crack at it. Is there something in the rule as currently proposed -- well, let me change that. Is there something in the rule as you would like to see it that would prevent people from bringing a dispositive motion that would cover everything at once? In other words, there are preemption issues that have been raised. Like, you've got a rule in mind.

MR. SHEPHERD: Yeah.

JUDGE JORDAN: Would the way you've got the rule in mind prevent somebody from bringing a preemption motion to, Judge Proctor's metaphor, move the forest along? Or is there -- yeah. Is there something that would make it impracticable to do what you're saying and still give a judge the opportunity to say, I'm going to look at this fully dispositive

motion first?

MR. SHEPHERD: No, I don't see a reason why they can't happen at the same time.

JUDGE JORDAN: Well, I mean, maybe they can't happen at the same time because you got one judge and you've got tens of thousands of claimants and thousands of lawyers.

MR. SHEPHERD: No, I understand that. But the way -- and I've heard this in the comments, and the way that I processed this would work, this is nothing different than a Rule 26 disclosure, right? A claimant files a case in the MDL, or it gets transferred to the MDL. Within 30 days, they have to make a disclosure. That disclosure is going to be some proof. Maybe it's the prescription records that they used a product. Maybe it's a receipt that they used a product. And if there's an injury, maybe it's a medical record. Two pieces of paper is what we're asking for.

If they don't give me those two pieces of paper, as a defendant, I'm going to file a one-line motion in the court to dismiss. The court's going to dismiss it because the plaintiff is not going to respond to it. That will happen in the beginning, and after it happens enough times, people won't file these

cases.

JUDGE JORDAN: So your point on practicability is there's a way to frame this so it doesn't jam the system up in the same way that a 12(b)(6) motion could stop everything if the judge said stop it?

MR. SHEPHERD: Right. Right. This is a self-executing instrument where they provide two pieces of paper, and if they don't, the case is going to be dismissed. They know it going in because it's in the rule. All the judge has got to do is sign the order. They'll have an opportunity, of course, to say I've got some reason why I can't do this or I didn't do this. But those are not going to be -- that's not going to happen often. That's going to be an exception. I mean, we know from looking at these cases and I've been in MDLs now -- we have hundreds of thousands of these cases. These people, they call a phone number, put her name on a piece of paper, a case gets filed, and they disappear into neverland. And those are the cases that we're dealing with.

Still, PFSs have to go out. We have to collect information on them. We have to get medical records on them. Getting those things are very, very difficult. If the case is moving forward as Judge

Proctor says, we have to continue to prepare our case, so we have to do those things. We have to follow the procedure that's necessary for us to defend our clients. But we're doing it so many times for people that they probably don't even know they have a case.

CHAIR ROSENBERG: Andrew?

PROF. BRADT: Yeah. I'm grateful for your testimony because I'm eager to understand the real problem here with these cases. These are not cases that are meritless because of something complicated. They're meritless because of, say, they don't have the receipt or the proof they used the product. What is the real practical problem of those cases being parked on the docket during the MDL process, where it seems to me that much of the discovery and litigation is over the common issues, and if those claims are truly meritless, you don't have to settle them? It's not a class action. You don't have to settle them all. You just don't pay them out on the back end. What's the real problem?

MR. SHEPHERD: I can give you three that come to mind. One, the PFS process is a process that is now ingrained in the MDL. It begins in the beginning and it goes out, there's a questionnaire that they have to fill out. They have to give us

certain information, medical records and certain information, execute releases that we can use. There is -- you would not believe how much time and effort is invested in those PFSs. That has to happen in these meritless places. Oftentimes, judges set up a system that if the plaintiff doesn't fill out the PFS or doesn't fill out core criteria on the PFS, there's a system in place that'll allow the court to eventually dismiss the case.

In the Mirena MDL, the plaintiffs were given eight different opportunities to fix their PFS before the court actually dismissed the case. That takes a huge amount of time .

Two, a lot of these cases, the amount of discovery that's done on the defense side is gargantuan. You're talking millions and millions and millions of pages of documents. Often, the reason that that level of discovery is allowed is because the number of cases that are out there, there's a proportionality rule and an argument that plaintiffs get to make that say, hey, there's so many people here, they should have to give us everything they have.

PROF. MARCUS: So, if you cut 10,000 to 5,000, that argument goes away?

MR. SHEPHERD: The nuance, Professor, it doesn't go away. But I will tell you, because I've stood in front of judges and argued this, if there are less cases, there will be less discovery. And I can't tell you how much difference it would make, but it will make a difference and there will be less fights because of it.

And then the third thing goes to settlement. I know it's long in the process. The rule as it's currently stated talks about early discussion of settlement or settlement early, early, early. Listen, defendants, nor plaintiffs, really, are going to settle early with all these meritless cases. Plaintiffs don't -- the defendants are not interested in making inventory settlements of meritless cases. And plaintiffs' attorneys, at least in my experience, hold out for more money in settlements and make it much more difficult to settle because they need to make sure that the claims of the plaintiffs with colorable claims actually are not underfunded because they've got to pay out meritless claimants that are also in that pool. So I think there are three practical reasons right there.

PROF. BRADT: Doesn't that mean there's an incentive for them not to file those claims at all?

MR. SHEPHERD: Say that again, I'm sorry.

PROF. BRADT: Doesn't that mean there's a built-in incentive for them not to file those claims at all if they're concerned that the better claims aren't going to get paid out?

MR. SHEPHERD: I mean, as you sit and think about it, yeah, but it doesn't make a difference. They're getting -- they're doing it.

MALE VOICE: Is it really the case that they have that incentive? I mean, I guess I'm talking to Henry here, right? It's not like one person is filing these claims. You can have somebody with great claims and somebody with lousy claims. The person with lousy claims has an incentive to have lousy claims because they think they're going to get some money out of it and it doesn't make a difference to them that it's going to intrude on somebody else's, or at least that occurs to me might be a problem. Am I thinking about that wrong?

MR. SHEPHERD: No, you're not thinking about it wrong at all.

CHAIR ROSENBERG: Okay. Thank you so much.

MR. SHEPHERD: You're welcome.

CHAIR ROSENBERG: Okay. Thank you so much.

MR. SHEPHERD: I do have numbers if people

are interested and have asked about numbers, I can give you the numbers. I have a set of them today for the Mirena litigation, and I'm happy to try to provide the same sort of information for any other MDL.

CHAIR ROSENBERG: Will you be staying for the day?

MR. SHEPHERD: I will be here probably to about 4:00.

CHAIR ROSENBERG: Okay. .

PROF. MARCUS: Those numbers are about outcomes or showings that these people right up front would have been excluded? Don't answer that question. That would be useful to know when you submit the numbers.

MALE VOICE: Well, and also what would be useful is not the numbers with respect to a particular product in a particular case because that's not what's being presented to us. What's being presented to us is there's this generalized across-the-world problem, right, that in every MDL of any size, you're going to have frivolous claims that are included in that.

So what I'm interested in hearing and I think what Professor Bradt started this conversation wanting to hear is what empirical data supports that because we're told by the other side of the aisle

that's just not so. It's not true. That doesn't mean there aren't a few here and there. But, as a general problem, they say that's not a problem. And so what we're -- you understand we're the neutrals.

MR. SHEPHERD: No, I understand. When they say that, are they talking about specific types of cases? So my focus is really going to be in products cases, and in products cases, it is something that we see all the time. I understand that MDLs are not always about products liability cases. And in that context, I can't speak to the empirical data. I can just do it within my world.

JUDGE PROCTOR: But we have to develop a rule that deals with products cases --

MR. SHEPHERD: I understand.

JUDGE PROCTOR: -- antitrust cases, sales --

MR. SHEPHERD: That's why you all get paid the big bucks.

JUDGE PROCTOR: -- obscured practices cases, so all right. Thank you.

MR. SHEPHERD: Okay. You're welcome.

CHAIR ROSENBERG: All right. Thank you so much.

Mr. Guth will address 16.1.

MR. GUTH: Hi. I'm Chris Guth. I am

senior --

CHAIR ROSENBERG: Sorry, I mispronounced your name.

MR. GUTH: No problem. General -- senior assistant general counsel at Bayer. I manage our litigations. In my time at Bayer, I have managed at least seven MDLs with tens of thousands of cases in those MDLs and hundreds of thousands of cases in the litigations overall.

I had some nice remarks that I think were going to flow really well. I want to instead try to answer some questions that have been raised here from the client perspective. I think I'm surprised at this point that we are debating whether this problem exists. I thought we had gone beyond that. I have never been in a room like this in meetings, where plaintiffs are also around, where we've been discussing the rule process, where I have met a single plaintiff attorney who has challenged the idea that there are unsupportable claims in every product liability MDL.

Now those attorneys have different ideas about whether those claims belong there, about why they are there in the first place, and about how to handle them. But, again, I have never heard a

plaintiff attorney challenge the idea that there are significant percentages of cases in MDLs that simply do not belong there. And so it's a bit concerning to me, who has been working on this process for the last six, seven years, where I thought we started six or seven years ago with a global understanding that this is a global product liability mass tort issue and now we seem to have been taking a few steps back from that.

That being said --

CHAIR ROSENBERG: Can I interject for a moment maybe to recalibrate us and not have you feel as if you're taking multiple steps back. Why don't you take a look, as I know you have, at (c)(1)(4)? Maybe tell us why that provision, separate and apart from I know --

MR. GUTH: Sure.

CHAIR ROSENBERG: -- points that were made by LCJ about maybe it's confusing as it relates to the discovery process, but assume that's not the discovery process. Assume that is up-front, early, the attorneys are to meet. They are to discuss many things. This isn't exhaustive, but many things, many things that likely are things that all of you have experienced in your MDL years and years and years of

experience. I'd be surprised if you haven't gone through most, if not all, of these issues in the checklist.

So (c)(4) speaks about not whether but how and when the parties will exchange information about the factual bases for their claims and defenses. Is that not going to the issue of the merits of the claims? Is that not going to the concept of initial disclosures? What about that provision? And why isn't that to some extent, maybe not perfectly, maybe not in mandatory language, why does that not go at least a few steps forward toward the very issue that most of us have been or most of you have been bringing to our attention today?

MR. GUTH: First of all, because it doesn't mention or address the issue at all, not in the rules section, not in the comments section. We here all understand that (c)(4) deals with unsupported claims. There's nothing about unsupported claims or even an allusion to unsupported claims in the note or the rule so far as we see.

CHAIR ROSENBERG: But, if you understand it is unsupported claims, but you don't see the word "unsupported claims," wouldn't you then be prompted to bring that to the judge's attention if the judge, for

some reason, was out of the loop and didn't understand what you all understood? So let's say the judge didn't read that as unsupported claims. You've just said you do. Wouldn't that be the very thing you would bring to the court's attention at the first hearing so that the court can say, what do you all think we should do about unsupported claims, and then form an opinion about actually how to address unsupported claims? How does this preclude addressing unsupported claims?

MR. GUTH: It doesn't preclude it at all. And you're absolutely right, we would go into the first case management conference as we do right now and seek some sort of method to deal with that issue. Here's the problem. Without a rule mandating that these -- that support for belonging in the litigation is actually required from the plaintiffs as they walk in the door, what you're going to end up with when I walk into a case and my outside counsel walk into a case management conference and say, this means we have to figure out a way to deal with these claims, you're going to have plaintiffs' counsel walking into that same conference and saying, oh, no, we don't need a really hard rule. These cases wouldn't have tens of thousands of plaintiffs filed in them that don't

belong in them if there wasn't some benefit or incentive on the plaintiffs' side to do that. So they would walk in and say, defense wants us to put forward all this stuff that we're never supposed to put forward and we're not supposed to do it this early in the litigation and it all comes out in the wash, why don't we go with the PFS system.

I guarantee, once forced to do something, it'll be why don't we go with the PFS system because that works so well. If the PFS system worked well, we wouldn't be having this conversation right now. We wouldn't have been having this conversation --

CHAIR ROSENBERG: Sorry to interrupt. So the existing rules, Rule 8, kind of doesn't mean anything to plaintiffs' lawyers in MDLs?

MR. GUTH: No.

CHAIR ROSENBERG: Rule 11 doesn't mean anything to lawyers in MDLs?

MR. GUTH: No.

CHAIR ROSENBERG: The potential for Rule 12 motions doesn't mean anything for lawyers in the MDL context? Is that --

MR. GUTH: Yes. If it did, we wouldn't be here. If it did, we wouldn't have thousands of cases in every MDL where people literally have not used the

product, literally do not have the injury, literally do not pick up the phone for god knows what reason, whether they're alive, whether they're not real people, I don't know, but plaintiff lawyers can't get a hold of scores of, of hundreds of, of thousands of plaintiffs who have been filed in these litigations.

So the evidence shows that those rules don't matter or they would be used --

PROF. MARCUS: That's why there's no PFS response from those folks?

MR. GUTH: Right. And that's why --

PROF. MARCUS: Then why doesn't that solve your problem?

MR. GUTH: Because the PFS system is -- okay, to Judge Proctor's question about what if we can deal with -- and I'm using this to answer your question, Professor, what if we can deal with dispositive motions to take care of this issue? We did that in a case. We did that in the Mirena case that Mr. Shepherd talked about, 702 motions excluded plaintiffs' experts. Summary judgment was granted on behalf of the company, case over. During that time, the PFS system was going through -- while the judge was handling dispositive motions, the PFS system was going through its stages.

This is worth -- this is the best PFS system I've ever seen, and I think, if it could be done better, it would have already been done. Plaintiff files a case. The plaintiff lawyer has 60 days to provide a PFS. If it's not provided on time, they have 30 days to cure it. If there's no cure, bearer has to give notice to the steering committee. Then they file a motion without prejudice at the next case management conference.

Then, if there's no cure, we file a motion to dismiss without prejudice. Then the motion to dismiss is argued before the court. Then there's a show cause order. This is all in the comment. And then we have to go back with another chance for them to cure it. And then we go back to the court. Now one second. We go back to the court for a motion to dismiss with cause. That's the PFS system because it's negotiated. Because it is negotiated, you're going to have 17 steps of cure and fixing, these people never show up.

I think we have a handful, literally a handful -- if Mr. Shepherd's still here, you can ask him -- a handful of the hundreds and hundreds of plaintiffs who are dismissed who ever fought back on anything, who ever responded to anything, which is

why, if we institute a rule that mandates it, we're not litigating this forever, it will be prophylactic. They're not going to file these cases. It will make the MDL world so much simpler because they will be gone.

PROF. MARCUS: And in that case you just described, was that prophylactic effect noticed? Did people stop filing those claims?

MR. GUTH: In the PFS world? They just didn't respond to the PFS. They had nothing to -- they didn't lose anything.

PROF. MARCUS: No, my point is, if the goal of doing this is that the claims will not be filed, does that experience show that's what happened?

MR. GUTH: I don't know. I don't know the kind of temporal relationship between -- the PFS -- the answer is I don't know because I'd have to look at when they were dismissed versus when they were filed, which firms' cases were dismissed and filed. So it's a fair question. I don't know the answer to it.

JUDGE JORDAN: Can I ask a question --

CHAIR ROSENBERG: Judge Jordan and then Judge Proctor.

JUDGE JORDAN: -- because I don't understand. I thought your assertion, Mr. Guth, was,

if we had a rule that required something up-front that would screen these, that would be a prophylaxis because that would stop people from doing this going forward. I'm not understanding your question, Rick, because your question seems to be, well, the PFS system was operating in this case, didn't that make it better? And if I'm understanding the point that's being made, it's the PFS system doesn't work. That's why we want the other system. So maybe I might be missing something.

PROF. MARCUS: Judge, I can clarify. I know I've heard MDL recipient judges report on the avalanche of claims they kept getting. Now, if this prophylaxis works, the avalanche should stop

MR. GUTH: The PFS system is a -- it actually is a discovery tool. It truly is. I know you've heard us say that, but we're not pretending -- we're not turning the PFSs into something they're not. PFS is our discovery tool. We end up having to use them. Those sheets are intended to get information about actual plaintiffs to help us move the actual plaintiffs' cases forward, seriously. They're not meant to vet claims. They're meant for us to get names and addresses and family members who saw them use the product and medical records so that we can get

cases ready for trial. That's our expectation.

CHAIR ROSENBERG: Let me --

MR. GUTH: But then what happens is --

CHAIR ROSENBERG: I'm sorry. We're running a little low on time and I want to just make sure Judge Proctor's question is answered.

JUDGE PROCTOR: Yeah. I just wanted to clarify. No one is suggesting this isn't a problem. When we ask for empirical data, we're trying to determine is it a problem in every single MDL no matter what. And that's my point, is you've just given us a prime example of how this rule could work. In the MDL you referenced, you got in front of the judge; you said you needed this procedure. It was negotiated and approved by the court and there was a process in place.

Let me take you back. You're now the client in the hypothetical room I talked about and your outside counsel is saying we would like to incur hundreds of thousands, if not millions, of litigation dollars litigating whether or not everybody who's filed in this MDL is properly in the MDL. At the same time, we're filing what we think should be, odds on, a successful across-the-board TKO. Do you give them the green light to go spend millions of dollars that may

end up being wasteful at the end of the day, as opposed to --

MR. GUTH: Every time. Every time.

JUDGE PROCTOR: Every time?

MR. GUTH: Every time.

JUDGE PROCTOR: Well, okay.

MR. GUTH: And I am the client --

JUDGE PROCTOR: Let me ask you this. Is it reasonable for general counsel not to do that every time?

MR. GUTH: No, because these cases --

JUDGE PROCTOR: I'd say you're going to have some disagreements there.

MR. GUTH: Absolutely not. I don't think you will find a single defense corporate counsel here who will say that it is not hugely important to fight against the unsupported meritless claims that are being filed because, even if it was a bifurcated case, and you, Judge, put a stay on everything happening in that case --

JUDGE PROCTOR: Let me ask you this.

MR. GUTH: May I?

JUDGE PROCTOR: Okay. You've answered. You've answered.

MR. GUTH: Just one thing.

JUDGE PROCTOR: But I'm the judge. Well, hold on. I'm the judge. Why should I and my staff have to devote thousands of hours, hundreds of hours, even dozens of hours doing something that may be unnecessary in the end?

MR. GUTH: So, Judge, I lost the point I was going to make when I rudely kept talking while you were talking, so I guess that's what I deserve by doing that. So I guess I would respond with a bit of a question to -- or an actual question back to you, which is, if you were dealing with a summary judgment or a preemption motion, and a summary judgment motion would require discovery to begin with, and so my question to you is, are you really going to put a stay on the entire litigation while you handle the preemption motion is really the only --

JUDGE PROCTOR: Oh, we do it all the time in single plaintiff versus single defendant. Ironically, as we were in this meeting, one of my law clerks sent me a text order staying proceedings so the parties can accomplish another task they've asked to accomplish by their agreement, but we do it on qualified immunity. We do it on motions to dismiss. In securities litigation, as you know, you're not even allowed to start discovery until motions to dismiss are decided.

We do it across the board in all sorts of other cases. And I don't see why product MDLs should be different. You can get in front of a judge and make all your arguments that you're making here in that case, but I don't think you can make these arguments that we should impose as a Committee or a subcommittee, we should impose on each transferee judge an obligation when it doesn't make sense in a particular case that we can't even envision right now.

CHAIR ROSENBERG: Let me see if Andrew has a quick question. Then I think we're going to move on.

PROF. BRADT: Yeah. My only question is a spin on Judge Proctor's. He's concerned about the scope of the problem across all different kinds of MDLs. I don't think anybody would dispute that there are meritless cases filed in MDLs. There's meritless cases filed in all other contexts as well.

What I'm concerned about is the extent of the problem. I've heard you cite that tens of thousands of cases were dismissed, and then you moved to thousands, and then, in your most recent comment, you said hundreds and hundreds. And so I guess I'm trying to figure out, it's like how many communists are in the State Department? I'm trying to figure out what the real numbers are.

MR. GUTH: Well, it depends on how big your litigation is, right? And so, if we had a litigation, I had a litigation, that was an MDL. Back in the days when we talked about claim numbers like 500 and 600, you're obviously only going to have a handful. In our Xarelto litigation, we had a thousand cases. I mean, this is a perfect example of what happens when you don't have a rule that is a front stop to all of this.

Judge, I hear you about the work that you're concerned about you and your staff having to do. I think we probably disagree on the ultimate amount of work having to be done due to the prophylactic effect that I hope would happen. And, frankly, if we don't think there's going to be a prophylactic effect, then I think the rule has failed because we're not trying to figure out how to better litigate claims that don't belong here in the first place. We're trying to keep them from coming in.

But, in Xarelto, we had over a thousand cases dismissed on the PFSs that's remedy-able. Over the entire course of the litigation, right, the court and the parties are dealing with those PFSs. We had 500 additional cases dismissed out of 1200 that were picked to get worked up for trial. So now it's again infecting the entire process of the litigation, right?

Now we're at trial selections and 40 percent of 1200 gone the first time the plaintiff lawyers had to look at them.

Then, in settlement, so now we're at the tail end of the litigation, another 2,700 cases gone because they never belonged there. So there's, I don't know, 5,000 -- no, 4,000, Professor, in Xarelto, for example. So tens of thousands was probably flippant by me. I don't have any of my cases where tens of thousands have been dismissed. But there is four plus thousand in Xarelto. And the judge had to deal with it and the parties had to deal with it in the entire process.

CHAIR ROSENBERG: We have one quick question from Joe.

MR. SELLERS: I just want to -- it would help me at least to know when you talk about 4,000, for instance, you haven't given us -- what's the universe? Four thousand out of 100,000, 30,000?

MR. GUTH: Out of 30 -- I think there were 32 in the MDL, so, like, 11 percent or something. I think that's right, but we had a much larger litigation in state court too, but that's about right. In Mirena, I don't know, it was 20 percent-ish. And I hope I'm not putting words in Mr. Shepherd's mouth, so

out of maybe 5,000, a thousand. I mean, percentages are nice to look at, but the raw numbers can be disconcerting too. It's there.

CHAIR ROSENBERG: Question from Judge Lauck.

JUDGE LAUCK: So, when you say they were dismissed at different times as meritless, was it for all the same reason?

MR. GUTH: I don't know. I mean -- well --

JUDGE LAUCK: Well, that actually could matter because, of course, as litigation goes on, things may be deemed meritless for reasons that occurred during the litigation.

MR. GUTH: I hear you, Judge. I get what you're saying now. That's the danger. We haven't yet figured out a good single word to describe this stuff. I don't mean lack of legal merit, like we win because the product didn't deserve to have a warning. We did that at trial. I mean cases where they literally didn't use the product. I guess I don't know why a plaintiff lawyer dismisses their claims, but if a plaintiff lawyer fails to fill out their PFS, there could be any bunch of things. But the point is it should have never been filed in the first place because all a PFS asks you to do is give me your name, number, tell me where you got your prescription from

and what your injury is. That's the basis of a lawsuit. It's literally the basis of a lawsuit. And when they don't do that, that's meritless or unsupported or whatever. That's the vast majority of those dismissals. When a case gets picked to be worked up for trial in an initial trial pool and the plaintiff finally sees their case, finally sees their case and maybe finally talks to their client and says, no, I'm out of here, pick another case to go to trial, I don't know really why that plaintiff lawyer for the first time in five years decided to let it go, but that's what I mean by meritless.

CHAIR ROSENBERG: All right. Thank you so much. As you can see, we're not eating lunch now at 12:30, but we're going to do that at 1 so we have time for at least one and maybe two. Let's see what Mr. Haston has to say about 16.1. Thank you so much.

MR. HASTON: Good afternoon, Judge Rosenthal and fellow Committee members. I'm sorry that I'm the one standing between you guys and lunch. I will try to have something original to say for the group.

My name's Tripp Haston. I'm a partner at the Bradley Arant Firm in Birmingham, Alabama, and I'm pleased to appear today on behalf of the International Association of Defense Counsel, or the IADC,

concerning proposed Rule 16.1. The IADC is a 103-year-old invitation-only organization of more than 2500 attorneys who have varied practices in civil litigation and international arbitration. We've been a leader on civil justice reform issues as the founder of DRI in 1960 and as one of the three founding member organizations of Lawyers for Civil Justice in 1987.

Many of our members, including myself, have served in leadership and supporting roles for numerous clients in multidistrict litigations as outside counsel and as well as corporate counsel. Together with my fellow IADC members, over the last 20 years, we've witnessed exponential growth on the MDL dockets. We're convinced the primary cause of this growth and the burden on the court system is the absence of adequate measures to prevent the meritless filing of lawsuits and MDL proceedings.

Now that concludes about the original comments that I have to make because most of what you've heard today were the things that I had planned to talk about today, because the three things that I had planned to address that are in my outline that you have in front of you are the need for what I call a fair filter in 16.1(c)(4).

Judge Rosenthal, you talked about the --

Rosenberg -- you talked about the existing rule, and I think one of the reasons that you're hearing so much from all of us about this is this is the first time we've had a rule on MDL litigation truly, right. And so I appreciate no one being defensive about hearing so much about it because there's a lot of concern and care about what you actually say, and that's what today is really about. I'm delighted that we are getting really good questions about the focus.

And, Professor Bradt, there is a bright young associate in Birmingham, Alabama, who doesn't know this yet, but they're going to be tasked with developing the empirical data that you and other Committee members are so desperate for because that data does exist. And Mr. Guth, who's a client, I was involved in leadership in the Xarelto litigation. He stole my thunder, about 4200 cases going out.

Just to sort of say it one more time, for us, I think this is the issue. If you're going to receive the benefit of an MDL as a plaintiff, I don't think it is too much to ask to show up and provide the factual basis for your claim at the very beginning before you're allowed citizenship into that MDL. The longer you're in, the more complicated -- the meritless claims, the longer they're in, the more

complicated it makes administration of the MDL.

There have been a lot of questions about that from the panel. And I would cite you to Judge Casey Rodgers' Law Review article that is found at Footnote 14 in LCJ's note, where she talks about in her Law Review article that was published in 2021 that the high volume of unsupported claims interfere with the court's ability to establish a fair and informative bellwether process.

So it has an impact on the court, not to mention the millions of dollars that are spent by the defense in getting meritless cases out that should never have been there in the first place if they just showed up and provided the most basic information to allow them to be citizens in the MDL.

The other two comments I had were -- and Judge Proctor raised this as well -- I think it would be terrific if more judges embraced cross-cutting issues at the very beginning. But I don't think that there is a choice, a dichotomy, between having to sort of address a cross-cutting issue and also asking the plaintiff for the basic citizenship type of information they need to participate because what happens is, as everyone knows, is that MDLs get rolling, they get involved, they roll down the road,

and it takes some time to get a motion up before the court to address the court and resolve it. And so --

JUDGE PROCTOR: You realize most citizens are born, not naturalized?

MR. HASTON: I'm sorry, Judge?

JUDGE PROCTOR: Most citizens are born, not naturalized.

MR. HASTON: Yeah. Well, a fair point. But I think all we're asking for is, you know, the MDL vehicle has made things very easy to participate in litigation. And I think that from the defense side, if we could just make sure we have the right people in the litigation from the beginning, not four or five years down the road, it would be better for everyone.

The other comment I have is about direct filing orders, and I think this goes to the point that whatever this Committee says and puts out in your commentary will be cited and held up and used. I think several of us are very troubled about direct filing orders. Mr. Stoffelmayr addressed that with us. And so we're not saying prohibit direct filing orders. We're just saying there's no need to mention them. If the parties agree to it, great. But there's often situations where we are strongly encouraged to agree to this because it just makes everything easier

for administration. But it will require defendants to waive some fundamental rights to get there. And so that's why we're saying there's no need to be explicit about it because of that reason.

CHAIR ROSENBERG: Thank you.

MR. HASTON: You're welcome.

CHAIR ROSENBERG: Andrew?

PROF. BRADT: So, on that direct filing point, I just want to ask the same question I asked to Mr. Campbell. You say in your outline that they violate Rule 3 and the statutory framework of MDL.

MR. HASTON: Yes.

PROF. BRADT: I guess I'm curious as to why because I haven't heard the answer to that yet. And second, direct filing orders, it sounds like you're concerned that they're strong arming to get stipulated to. But is there a circumstance where defendants are actually unable to raise personal jurisdiction and venue considerations if they come up later, after a case has been direct filed? They don't waive them for the whole case, they waive them just for the purpose of pretrial, right?

MR. HASTON: Right. So let me answer the first question. I think what the LCJ note says is that direct filing orders are inconsistent with Rule

3, which talks about that it governs the commencement of actions by filing in the correct court, right, venue, jurisdiction, and the like. And --

PROF. BRADT: No, it's the filing of the complaint that commences the action.

MR. HASTON: Can I answer the second part of your question about statutory framework? It mandates that MDL transfers shall be made on a JPML, not that something is to go directly to the court. It's supposed to go through the JPML. And so that's our point on direct filing orders.

CHAIR ROSENBERG: Okay. Thank you so much.

MR. HASTON: Thank you.

CHAIR ROSENBERG: We really appreciate your comments.

Mr. Leventhal on 16.1?

MR. LEVENTHAL: I guess I can't say good morning anymore. In any event, thank you for having me. My name's Markham Leventhal. I'm a litigation partner at Carlton Fields, a class action defense lawyer. Consistent with my letter that I submitted on October 5, I believe I'm going to address subject matter jurisdiction, and what I mean by subject matter jurisdiction is, in particular, Article III standing.

So some basic principles that we're all

familiar with. Number one, standing as a constitutional requirement comes from Article III, Section 2 of the Constitution, and it's derived from, of course, the case or controversy requirement. In Spokeo, one of the -- I guess it's a 2016 Supreme Court case, the Supreme Court, citing Raines v. Byrd, which is an older standing case, said no principle is more fundamental than the judiciary's proper role in our system of government and the constitutional limitation of federal court jurisdiction to actual cases or controversies.

And, of course, the Supreme Court has repeatedly emphasized that every district court judge, whether an MDL judge or not, has an obligation to supervise and police constitutional standing. And I think in my letter I cited to U.S. v. Hayes. The quote is, "The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." And it goes without saying there is no Article III exception to MDL proceedings. So the court needs to ensure that it receives from the plaintiffs all the essential information to ensure there's constitutional standing. So what are the requirements of constitutional

standing? I think we all know what they are, but, basically, three elements. Number one is injury-in-fact. Secondly, that injury-in-fact has to be traceable, traceability to a particular defendant that's named in the proceeding. And third is redressability.

So traceability, of course, is a causation concept. And the Duke Power case was framed as the plaintiff has an obligation to establish a substantial likelihood that the defendant caused the injury. That's traceability. So we've got three constitutional requirements, and the plaintiff bears the burden of establishing those three elements and that burden applies at every stage of the proceeding. So also in Spokeo, the Court said at the pleadings stage, the plaintiff must clearly allege facts demonstrating each element of standing. And then, in TransUnion, the famous quote, "Standing is not dispensed in gross. Rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief."

But, unfortunately, in many of the MDL proceedings, particularly those that we've been talking about, the larger ones, thousands or hundreds of plaintiffs, the transferee judges are just simply

not being provided with the information that they need to ensure that all the plaintiffs have standing. As a result, you have heard improper claims, some people referring to them as meritless claims, but I'm focusing on the constitutional obligation to ensure that there is standing.

So let's turn to the proposed rule. Section C talks about the transferee court should order the parties to meet and prepare a report to be submitted to the court before the initial conference. And that's a great idea. But then there is a list of essentially things that are, I guess, discretionary, not mandatory, but, in any event, standing is not mentioned anywhere.

So I looked at (c)(4) and I guess that seems to be the place in the proposed rule where this would most likely be addressed. And so the suggestion that I have is that (c)(4) should be revised so that the report shall address, not may address but shall address, number one, whether the parties agree or disagree that the plaintiffs have established standing.

And there may be some cases -- there are other MDLs, small MDLs, not everything is a massive product liability, where there could be no issue of

standing. You could have a pension plan litigation, you might have insurance policies or whatever. And the parties will agree in the report we don't have an issue of standing, we don't anticipate. In others though, if that's not the case, then the report should state how and when. And this is sort of a takeoff on the rule that's there but more specific and more tied into the LCJ's suggestion. If not, how and when sufficient information will be provided by each named plaintiff to establish injury-in-fact and traceability and, of course, redressability.

And we could talk -- there are volumes written on each one of those requirements, but that's the basic suggestion that in the report, do you agree there's standing? If not, how and when will the basic information for standing be prevented -- be provided to the transferee judge.

CHAIR ROSENBERG: So about five minutes to reserve final comment, and then I'll see if there are any questions.

MR. LEVENTHAL: Okay. One final comment on the existing Subsection (c)(4). So this doesn't have anything to do with an exchange of information, and it also doesn't have anything to do with defenses. So I would strike both of those words, "exchange" and

"defenses," from (c)(4). I agree with the LCJ's proposal, except, again, I think it should be mandatory in every initial report.

CHAIR ROSENBERG: Okay. Thank you so much.

Ed?

PROF. COOPER: There's two preliminaries, then the question. First, the Supreme Court also says regularly that standing is a question separate from the merits. Second is you have sketched the burden as to standing depends on the stage of the litigation in which the question is raised: pleading, summary judgment, trial. And the question against that background is, suppose the plaintiff adequately pleads a claim for relief to whatever standard of pleading applied, can you get the case dismissed for lack of standing?

MR. LEVENTHAL: Well, of course, you can get the case dismissed. You can move for lack of subject matter jurisdiction.

PROF. COOPER: Yes. And why does a plaintiff who has adequately pleaded a claim for relief -- you're now talking, you know, all these MDLs, as far as I know, a claim to recover damages. When does that plaintiff who has a claim for relief not have standing to pursue the claim?

MR. LEVENTHAL: Well, that could very well be the case. But there are a lot of situations where the plaintiffs have not established a right to damages and --

PROF. COOPER: Yeah. Well, but that's the whole point. What is difference between proving the claim, pleading it, defeating summary judgement, establishing it at trial, what is the difference between that and standing that says, yes, you have a claim, you can prove it at trial, you can recover damages, but you do not have standing to pursue that relief?

MR. LEVENTHAL: Okay. So I would answer it this way. You're absolutely right that the issue of standing goes through phases, and the burden, so-called burden of proof heightens as you go through. At the trial stage in TransUnion, the court said, nobody can get damages awarded under Article III unless they prove standing. At the summary judgment phase, maybe an affidavit or whatever is sufficient. At the pleading stage, however, you have to have established the basic facts of standing. And it's an independent obligation of the court to look at that. It's not an obligation. It's an obligation, obviously, of the plaintiffs to provide that

information, but the court has its own obligation to supervise and police subject matter jurisdiction.

So I think that both things can happen at the same time. I mean a pleading requirement is different, and that could be tested later on on Rule 12 or whatever, summary judgment. But my point is that at the inception of the litigation, at the pleading stage, there is a constitutional requirement to establish basic information, provide it to the court so that standing exists. And that, I believe, if it was in the report and a requirement, would go a long way to eliminating what we've heard so much about so many meritless claims.

PROF. COOPER: One last variation in response, and then I will desist for others. At the pleading stage, the question of subject matter jurisdiction can be treated as a question of fact, as you say, and the court can inquire into it. Does that mean that the court should be able, without a jury at a hearing not described as a trial, decide whether the plaintiff has proved its claim on the merits, has proved that I used the product, the product injured me, the product was defective, but still say you do not have standing?

MR. LEVENTHAL: I think that that would

probably be unlikely. It's not something that I've seen before. And, of course, at the pleading stage, you know, that's not going to be the ultimate requirement. So I'm just suggesting that at the pleading stage, there should be a mechanism in MDL proceedings such that the plaintiffs are providing the court with the basic essential elements of standing, injury-in-fact and traceability being the most important.

CHAIR ROSENBERG: Judge Proctor?

JUDGE PROCTOR: So, if I'm a brand-new transferee judge taking over a 200,000 claim MDL, your expectation would be that on day one I should start looking at 200,000 claims to see if each one of them has standing?

MR. LEVENTHAL: My expectation would be, at the initial conference, you would get a report and you would see either the plaintiffs and defendants agree that standing's not a big issue here or that the defendants say standing is a big issue and why and what's going to be done. The how and when of what is in (c)(4) now, how and when is that going to be addressed.

JUDGE PROCTOR: How does 16.1 not permit exactly that?

MR. LEVENTHAL: How does it not?

JUDGE PROCTOR: Yeah, 16.1 says prepare a report, give it to the transferee judge. Tell them what legal and factual issues need to be discussed and a process for assessing those. But I think you're -- I thought -- maybe I misunderstood your point, but I thought your point was I've got an independent obligation, even if parties don't raise it, to make sure everybody has standing, and that means I'd have to go through 200,000 claimants to see that each one of them has standing?

MR. LEVENTHAL: I'm not asking you to do that. What I am asking you to do, though, is to ensure that there's a mechanism in place where that information is before the court, and if the defendant wants to raise that issue, it can.

CHAIR ROSENBERG: I'm sorry to interrupt. That's what (c)(3) is. I mean, that's what (c)(3) is. You see, this list is not exhaustive and it doesn't require that the parties agree about what the issues are, as they often don't through counsel, so we could have a conference and the plaintiffs could say, judge, we see these as the paramount legal issues. And the defense could stand up and say and we see these and highlight standing, right?

MR. LEVENTHAL: Yes, but there's no requirement specific to standing, and that's what I'm getting at.

CHAIR ROSENBERG: Yeah. Okay. Are there any other questions on -- no. Okay. Thank you so much.

MR. LEVENTHAL: Thank you.

CHAIR ROSENBERG: So I have a question for Ms. Keller because you've waited patiently. We could take you now, at 1:03, or, because I know you anticipated going at 12, so if you otherwise were planning on having lunch, we could take you as the first witness after lunch, which would be about -- we're going to shorten lunch a bit. Are you under a time constraint?

MS. KELLER: I am not, and it's whatever you prefer.

CHAIR ROSENBERG: Okay. I think then let's pause for a lunch break now, and thank you for accommodating us. So we have -- we're almost on schedule if we go with a half-hour lunch and Ms. Keller has kindly agreed, so we're really only one witness behind. So let's try to eat lunch in a half-an-hour. So that's like 1:34 if that's comfortable for everyone. So look to reconvene in about 30

minutes. And, again, we appreciate it. It's a balance of making sure you've been heard but keeping to a schedule. We're planning on adjourning at 3:30, but if some of you are still here and some of us are still here, we may want to further engage. So thank you so much.

(Whereupon, at 1:04 p.m., the hearing in the above-entitled matter recessed, to reconvene at 1:34 p.m. this same day, Monday, October 16, 2023.)

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A F T E R N O O N S E S S I O N

(1:35 p.m.)

CHAIR ROSENBERG: I just want to, you know, tell everybody how appreciative we are for you all to be here. I know we've lost half the group. I hope that wasn't due to anything other than scheduling and that they've already said what they wanted to say. This is just incredibly valuable, and the Committee members and reporters have spent an inordinate amount of time reading I think it came to over 150 pages worth of summaries that you all submitted. I don't know if you saw that among all of yourselves. So this is really our first opportunity to ask questions of the astute remarks that you've given us.

So I certainly don't want anybody to walk away viewing the questions as anything other than that, inquisitive minds among people who have spent years now studying this issue and just wanting to make sure, even though we've heard from many of you many times before, that we fully understand the issues and can appreciate fully the input that you're giving us.

So I know I speak on behalf of all of us in saying thus far we have found it to be very helpful, and we know this is time away from your primary positions, and the time you put into preparing your

summaries and to come here today is not lost on us. So thank you so much.

I think we're going to go a little bit out of order because I think there is a flight or two and we want to make sure that nobody is delayed. So, if I'm understanding correctly, Lana Olson will go next on privilege logs.

Is that okay with you, Amy Keller, who was promised to come up first after lunch? So as long as you're okay.

Lana, let's hear from you, if we could, on privilege logs, and thank you for your patience, and we look forward to hearing from you.

MS. OLSON: Thank you so much. And I appreciate you accommodating me and hated to make a big mess out of the schedule, but I do appreciate it, as will my daughter.

CHAIR ROSENBERG: I made the mess, so you're helping us clean it up.

MS. OLSON: Good afternoon. And thank you so much to the Committee for considering this important issue. My name is Lana Olson and I am a 25-year practicing lawyer in Birmingham, Alabama, and for about a week-and-a-half longer, I am the president of DRI, not that I'm counting at all. I'm appearing

before you today on behalf of DRI, which is the largest legal association representing the interests of business individuals in civil litigation, as well as DRI's Center for Law and Public Policy, DRI's national policy and advocacy arm.

I am here today to discuss the proposed amendments to Rule 16 and 20 --

(Technical interference.)

MS. OLSON: DRI believes that the parties' planning conference should include a substantive discussion about how claims of privilege and trial preparation materials best be handled by the parties in a particular case. That means specific discussions between counsel about both the timing and the method, which can ultimately be reflected in the case management order. I have seen firsthand what happens when such early discussions and decisions do not take place. For example, a party undertakes its work to provide relevant documents to the other side, sometimes flagging those privileged materials in order to get the documents out as quickly as possible without focusing on what the format will ultimately look like for disclosing items withheld for privilege.

Then, all of a sudden, late in the discovery period, that party receives a demand for a document-

by-document privilege log to be produced in the next 10 days. At that point, it is much more difficult to suggest categorical limitations, carveouts, or alternative solutions to the document-by-document log.

Alternatively, a party might start logging privileged documents from the beginning and in fairness try to group together entities by family or category, only to find out months or years later that the other side objects to such an approach, which means potentially redoing large parts of the privilege log.

In my experience, this isn't a one-size-fits-all issue, which is why making this part of the Rule 26(f) conference and ultimately part of the formal case management plan would be a welcome and much-needed change. Indeed, alternative solutions for the timing and method for addressing claims of privilege in trial preparation materials is a topic that's received relatively little focus today but is ripe for creative lawyers to work together to identify ways to do this better. Knowing early on where there are agreements or areas of dispute and having them addressed and resolved early, before burdensome and potentially unnecessary work is undertaken, would be a vast improvement over what's currently taking place in

many cases today.

Providing a clear path to prompt the parties to consider how to manage the review and disclosure of privileged materials is certainly in line with the overall purpose of the rules, to secure the just, speedy, and inexpensive determination of every action. I can say without hesitation that in my practice, there's not a single time I can recall when having this discussion and resolving disagreements earlier would not have been a better approach. Without that early discussion and the ability to craft a bespoke plan that makes sense in the context of a specific case, a cascade of inefficient, uselessly expensive, and distracting results can occur that benefits no one, neither party on either side or the court.

Importantly, in addition to the proposed amendments to Rule 16(b) and 26(f)(3)(D), DRI also support the proposal from LCJ to amend Rule 26(5)(b)(A) to make clear that the rule does not require document-by-document privilege logs but rather allows parties to create categorical logs or agree to other alternatives.

While the current proposals before you certainly improve the situation and while we understand that the Committee has previously looked at

the issue of amending Rule 25 -- 26(b)(5)(A) as well, we do agree with the LCJ that an amendment to 26(b)(5)(A) is also important and necessary, and we sincerely hope that you're open to reconsidering that additional amendment to the rules regarding privilege laws. Thank you so much for your time, and I'm happy to answer any questions.

CHAIR ROSENBERG: Thank you. From our reporters? Rick?

PROF. MARCUS: Well, two things. Thank you very much. This has been very helpful. One is if you could say a word about what a categorical log is and what categories you have had experience using to good effect. And I thought I had another question, but perhaps I don't. Oh, and the second is, am I correct in understanding, which I think is different from what someone said this morning, that you think postponing this issue and this problem until after documents are collected, et cetera, would not be a good idea? I'd just make sure that I'm correct about that. I'm interested also in categories.

MS. OLSON: Sure. Let me answer in reverse order because that may be more helpful. So I think having the discussion earlier is better. What that discussion consists of may be an agreement to

postpone privilege discussions until, you know, after the first set of documents are produced or agree that we will exclude a certain category of documents, which I'll talk about more in a minute, up-front and then, you know, carve out timing for when certain things will happen.

I think that's the most important point. It is something that the parties need to talk about and need to agree about. It may be that you can say this is a case where we know we can carve out A, B, C, D; there's Categories F, R, W and we know that those aren't going to be required to be logged individually.

And so everybody starts out on the same page. That doesn't mean there may not be issues that are raised later on, but at least starting out, everybody has an expectation of what to do as they begin reviewing and producing documents.

On the categorical log, that's a term I think people can use sort of having different meanings, but, to me, and I have a case right now, it's a large toxic tort case, where we did this. We talked early on and we agreed for categories we would not require logging of communications between a lawyer and their client after the retention of the lawyer. So we knew that neither side had to worry about post-

retention logging, which some people have sort of done and understood, but some people don't necessarily approach it that way.

We also were able to exclude a couple other categories, timing-based categories, so things that occurred after the filing of the complaint. We were able to include certain documents with regulatory agencies. Everybody agreed we are going to require logging if you're going to hold anything back on privilege because we don't think those are actually privileged.

So the categorical discussion is really something that is case-specific. It's counsel-specific and jurisdictional-specific. But I think it makes great sense, as opposed to spending thousands and thousands and thousands of dollars on the front end or the back end going down a path that you don't necessarily have to go down.

PROF. MARCUS: Can I ask sort of a follow-up question?

MS. OLSON: Sure.

PROF. MARCUS: We've been urged to say something in 26(b)(5) as well. Do you think that's desirable, important, since we're talking about the 26(f) meeting and 26(f) as it is amended going to say

talk about this?

MS. OLSON: Right.

PROF. MARCUS: Why is it useful to say something over in 26(b)(5)(A) also?

MS. OLSON: I think it's the icing on the cake to make everything as clear as possible. I think that specifying you have to talk about the timing and method without that accompanying change to the role could lead to the result, for example, okay, so we're talking about the timing and method, I want a document-by-document log and I need it within 30 days.

That's not the spirit, to me, of what the amendments to the rule was intended to do. I think having that very clear counterpart would help parties understand and give them a clearer path on not only what they need to do but what they don't automatically have to default to.

CHAIR ROSENBERG: Any Committee members?

(No response.)

CHAIR ROSENBERG: Okay. Well, thank you so much. I hope you make your flight.

MS. OLSON: Thanks.

CHAIR ROSENBERG: And we appreciate your testimony here today.

And, Amy Keller, thank you again for your

patience, and we'll hear from you now on privilege logs.

MS. KELLER: Thank you so much, everyone. It is an honor to provide my thoughts to you today. My name is Amy Keller. I'm the managing partner of Dicello Levitt's Chicago office, and I'm also the chair of the privacy, cybersecurity, and technology practice group of that law firm. I am one of the dreaded plaintiffs' lawyers that you've heard about earlier today, but I do take my Rule 8, 11, and 12 responsibilities very seriously.

I enthusiastically support the proposed amendments regarding privilege logs that the Committee has proposed, and the reason why I support them is because of my experience litigating a lot of these large multidistrict litigation cases. When we talk about MDLs, there's quite a few different varieties of MDL. I primarily work in class action cases. So, when we talk about plaintiffs' fact sheets, I don't really have plaintiffs' fact sheets in my cases. I abide by Rule 23 and we do discovery based upon that.

So some of these concepts don't really cross over when it comes to MDLs, and as I think about that, I think about how one size fits all doesn't really work for litigation, how imposing one thing upon, you

know, folks who are working in complex litigation doesn't work because there's so many different varieties and styles of litigation. And I think the way that the rule has been crafted and is proposed, it does lend itself to flexibility among the parties and among the court to really come up with a privilege log proposal that meets the needs of the litigation, as well as the concerns of both sides of the aisle.

Now I've heard a lot of facts and figures, you know, coming from some of the folks providing testimony today without a lot of citations to those facts or figures. So that's why I really wanted to draw upon experience from a real-world example case, and this is the In Re Marriott data breach litigation that's pending in the District of Maryland, and in that case, I serve as co-lead counsel.

Now this case really demonstrates why having these discussions at the front end of litigation is so vitally important. We had very accomplished ESI counsel negotiate a whole host of orders at the outset of the litigation, orders that were entered in July of 2019. Now, in one of those orders in the ESI protocol, the parties agreed that a party withholding documents based on one or more claims of privilege will produce a privilege log in accordance with a

mutually agreed upon or court-ordered time frame, right? But, beyond that, we hadn't agreed upon anything because, from plaintiffs', you know, perspective, we hadn't really had a situation where we had that much agreement with defendants before or met that much disagreement with the defendants before.

Fast-forward, you know, several months later, and all of a sudden, the defendant is proposing a categorical log. And, you know, I'm not necessarily opposed to a categorical log, and I agree with the folks from DRI that there are some things that you can agree don't have to be logged. I agree, you don't necessarily have to log communications with counsel after you file litigation. That doesn't make any sense. I don't want to have to log the communications with plaintiffs, right?

But there are some things when it comes to the actual merits of the litigation where having a categorical log just doesn't make a whole lot of sense because, you know, the rule, as it's written right now, of 26(b)(5)(A) says you have to describe the nature of the documents, communications, or tangible things not produced or disclosed and do so in a manner that without revealing the -- and this is where my writing has failed me -- without revealing the actual

information that's privileged or protected, will enable other parties to assess the claim, right?

It doesn't say anything about a log. It just says gives the other party enough information to actually assess the claim of privilege. So, if you want to give me a long, lengthy memo with a bunch of case law citations and describe the documents, fine. But, really, what the log is, it enables the parties and the court to sort through the documents and really efficiently look at that information.

Okay. So, when we were negotiating with Marriott, you know, we wanted to get some really baseline things before we agreed upon any kind of categorical logging, right? We were willing to consider categorical logs and we wanted that -- we wanted to agree on the categories being used, have an attestation by an attorney to provide reasonable context as to the role of the person making the privilege assertion, the applicability of the privilege and how the review was conducted, specific data points for categorical logs, and then, finally, distinct data points for document-by-document logs, you know, very reasonable high-level rudimentary stuff, and the defendants didn't want to do that, so here we are many years into the litigation and we

don't have a log that we can actually look at to assess the claim of privilege. And there are a lot of issues in this litigation where defendants may think that they have a good assertion of privilege that we can't test.

So, for example, in data breach litigation, right, after you have a data breach, you might have some kind of post-breach assessment that provides the party with a business side analysis of how it happens so they can remediate things, but then sometimes that's also used as litigation work product, right? And that is a very contested issue. But class counsel, we have to know so that we can test the privilege. This kind of categorical logging would not have allowed us the insight to really understand what was being withheld.

Judge Facciola was our special master in that case. He did a brilliant job. And we had so many conferences with him, I think, you know, he finally lost his patience because he said, if I had known that categorical logging would be this difficult for the parties to agree upon, I never would have suggested it. And I thought that was a pretty powerful statement by someone who had been working to say, hey, maybe categorical logging actually will save

the parties some resources. So anyway, he said do a document-by-document log, okay. I've had it with you two. Actually, do a document-by-document log. And we've heard a lot about overdesignation over the course of today. Because they had to do a document-by-document log, counsel actually had to look at the documents that they were going to put on that categorical privilege log, and they de-designated 13,000 documents, 13,000. And I'm not casting aspersions. I'm not saying anyone acted in bad faith.

But what I'm saying is, when you do the initial review, you have to do a follow-up review to make sure that the privilege assertion can actually stand up, that it actually has a basis, right? And only because we insisted on more information being provided so we could actually test the claim of privilege were we given more documents. The problem is, because we didn't agree upon this at the outset, we had to redo two depositions, right? We had to get more information on interrogatories. So it actually was inefficient and didn't go along with Rule 23.

CHAIR ROSENBERG: Thank you, Ms. Keller. So I think we probably have a couple of questions, so we want to make sure those get answered as well.

MS. KELLER: Sure.

CHAIR ROSENBERG: Rick, did you have a question?

PROF. MARCUS: One thing we have heard, including from Jonathan Redgrave, is that it would be a good idea, as Judge Facciola thought also, to say something in Rule 26(b)(5)(A), and I'm wondering if that would trouble you? And if it said something about the possibility of categorical log agreements, whether that would trouble you? And, finally, with your experience of reviewing millions of -- you began by saying --

MS. KELLER: Lines, yes.

PROF. MARCUS: Millions of log entries, how much help can technology provide for preparing a log and/or for doing the review process to identify potentially privileged documents? So, since we've heard much from one side, I'm interested in what you might say if you're sort of on the other side.

MS. KELLER: I appreciate that question. With regard to the comment about categorical logs, my concern is that that might be viewed as an encouragement to do them, and I don't want to necessarily say this is the way to go because some of the issues that we faced in Marriott might be the issues that litigants face in the future.

Another one of the issues with categorical logs is ,if plaintiffs are challenging them and saying, this doesn't give me enough information to actually challenge the claim of privilege, it shifts then the burden on the courts because now the courts have to do an in camera review of the documents that would be covered under the categorical privilege designations because we can't see them. And if opposing counsel isn't going to give us more information, I think that's just putting more burden on the courts.

I think it's okay to say the parties can consider, you know, different things to save time, save resources, et cetera. But I don't think we should necessarily encourage categorical logging because I do think it creates a burden on the courts.

To your second point --

PROF. MARCUS: But saying something in 26(b)(5)(A) referring over to what you are talking about would be okay with you?

MS. KELLER: Yes. If you say 26(b)(5)(A), you know, we said that the parties should meet early and come up with a game plan as to how to litigate the case at the outset, you know, and consider X, Y, and Z, yeah, I don't see how that's necessarily an issue.

With regard to your other question about technology, right? When, you know, first-year associates and second-year associates are doing a privilege review of electronically stored information, there's going to be metadata associated with those documents. So, when they click the button that something is privileged, it can create a log with to, from, subject line, date. That basic information is very helpful for plaintiffs from the outset because what it will do is it'll enable us to see was a lawyer involved at all in this communication.

And if a lawyer was involved at all in the communication, did opposing -- I'm sorry, did defendant also send the communication on to a bunch of other third parties, destroying the privilege? These things, from the outset of the litigation, from the outset of the document production, they can be done efficiently, very quickly, and can help us assess things and, as my colleague, Mr. McNamara, was referring to, sort of cull down the number of challenges that we have, right? Ultimately, it still remains the producing party's burden to establish privilege, but what this can do is it can help us get to it pretty quickly.

CHAIR ROSENBERG: Thank you.

Any other questions from our members? Judge Jordan?

JUDGE JORDAN: I'd asked one of the lawyers speaking from the defense side whether (b)(1) proportionality under Rule 26 was sufficient and was told no because it's not happening. People are treating this -- judges and case law coming out of the courts say that this has to be document by document and held to a high standard. Is that your experience? And if that is your experience, then why wouldn't we put something about proportionality into (b)(5)?

MS. KELLER: Well, when you look at -- so the concern being that because they're producing so many documents, the creation of a privilege log is burdensome and that's not proportional? Is that the argument?

JUDGE JORDAN: I think the argument as I understood it was relative to the size of the case, the amount of time, money, effort put into it is disproportional. It's disproportionate. It should not -- it shouldn't cost 22,000 attorney hours to produce a privilege log relative to the case that was being discussed or maybe relative to any case, but I'm trying to get a feel from your side of the "v.", is it, in fact, the case that privilege logs end up

being a disproportionate burden on the parties? And if they are, should 26(b)(5) be amended to make sure that the proportionality principle, which was at some serious cost, expense, and effort on behalf of the judicial conference, put into the rule, be made explicit as it pertains to privilege logging?

MS. KELLER: Well, and I'm going to answer your question by saying I think that issue would be resolved by the rule that you are all proposing right now, where you talk about these things from the outset of the litigation. Like I was referring to, no one-size-all-fits answer is going to necessarily help in all instances of litigation, and --

JUDGE JORDAN: Well, let me press you, Ms. Keller, because I'm trying to get an answer to this question.

MS. KELLER: Yes.

JUDGE JORDAN: Is it your experience from the plaintiff's side that privilege logging can sometimes be disproportionate in terms of the value of the litigation, that it's costing too much in time, money, and effort for people?

MS. KELLER: From my perspective, no. And the reason is because I have learned now to have negotiations early on to carve out things, right, from

logging and to have agreements, right, so that addresses the concerns about time and expense, et cetera. It also helps me because, on the plaintiff's side, we're producing more and more and more documents as it relates to causation. So, in a lot of my data breach cases now, I'm having to produce notification of every single data breach that plaintiffs have received from the last 10 years, which involves culling through, you know, emails, et cetera.

So, I mean, in terms of proportionality, we're starting to see that even out. And in my experience, because --

JUDGE JORDAN: So are you saying it's pretty much symmetrical?

MS. KELLER: I'm not saying it's symmetrical, no. I think that would be bad faith for me to say it's symmetrical. Just by nature of litigation, right, individual plaintiffs are not going to have a full set of documents on the design schema of a product or product testing or cybersecurity, but they will have their individual circumstances, right, which I have an obligation to go through and produce.

But what I'm saying is adopting this rule and having those discussions from the outset, as I am doing now, can address those concerns that defendants

have because you can carve out from the logging certain things. And if you have discussions with defendants, you can agree on certain principles that can accelerate certain review, like, for example, producing metadata logs, right, that help you look at these documents and do review. And then I can follow up with the defendants and say, I need more information on these documents, you know, you're going to have to give me this log a little bit faster so I can actually determine, you know, what's the privilege and how it's being asserted.

My concern is, if you put proportionality into the rule, that's all of a sudden going to foreclose those conversations from occurring because defendants are going to say proportionality.

JUDGE JORDAN: Let me make sure I understand because I thought I heard you saying it's already in there in what you're suggesting, but you're afraid that if we actually say proportionality in 26(b)(5), that that will do damage?

MS. KELLER: It will foreclose, I think, the discussions that you all are envisioning at the outset of the litigation to talk about the concerns that the defendants have and the plaintiffs have and to develop a privilege log protocol that would address those

concerns.

JUDGE JORDAN: So do you agree that 26(b)(1) is not being treated, that principle of proportionality is not being treated as pertaining to privilege logging?

MS. KELLER: I'm saying it is in my experience because I do have these conversations.

PROF. MARCUS: Can I -- I think this is in keeping with what Judge Jordan was just asking. One thing we have been told several times is that some plaintiffs' lawyers take the position that document-by-document logging is absolutely required by 26(b)(5)(A). I think you'd probably agree that is disproportionate in some cases, so maybe saying that in 26(b)(5)(A) would be a good idea?

MS. KELLER: But, again, I think, if you say it in the rule, what it's going to do is defendants are just going to say -- they're going to point to that and say, it's disproportionate for me to do a document-by-document log; therefore, I must do categorical logs and you might miss out.

PROF. MARCUS: But, if the current 26(b)(1) rule provision permits them to say this, I'm not clear on why saying it also in 26(b)(5)(A) would produce bad results.

MS. KELLER: Well, 26(b)(5)(A) doesn't necessarily say that you have to do category or that you have to do a document-by-document log anyway. You can have these early discussions per the rule that you all drafted and that I am supporting to have discussions from the outset as to how to develop things to -- really in keeping with Rule 1, right?

And my concern is, if you put that principle into 26(b)(5)(A), what's going to happen is a party may point to that and say, in no instance is it appropriate for me to do a document-by-document log because I have to produce over a million pages and that's not fair to me. What your rule is saying is the parties should have these discussions and, you know, you can bring it to the court if you're having a disagreement, you can resolve these things from the outset; you can resolve things very early on.

But putting that language in there may foreclose what you're actually trying to do with your proposed rule, which is have the discussions early, talk about ways to save time, effort, and resources, and come up with something that works for your specific litigation.

CHAIR ROSENBERG: Thank you so much.

MS. KELLER: Thank you.

CHAIR ROSENBERG: Thank you.

Ms. Larson, who will also address privilege logs.

MS. LARSON: Good afternoon, Committee members. It's a privilege to be here in front of you today and I appreciate the opportunity to address you. My name is Amy Larson, and I'm a litigator at BSP Law. We are a boutique litigation firm with offices in Troy, Michigan, and Houston, Texas. And my practice is focused almost exclusively on product liability defense. And since I started practicing in 2003, I and others at my firm have served in some capacity as national discovery counsel for various auto manufacturers. While not all cases I handle involve large document productions, the vast majority do.

Unfortunately, despite the 1993 Committee notes advising that detailed privilege logs "may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by category," a detailed document-by-document privilege log is the default format in almost every matter that I handle.

I appreciate that the Committee recognizes the burden and inefficiency imposed by document-by-document privilege logging, and I commend the

Committee for turning its attention to this issue. It isn't a particularly interesting issue to most people inside or outside the law. In fact, when I tried to explain this to my husband, he told me he was struggling to stay awake after two minutes, and this was particularly telling given that my husband has a Ph.D. in accounting.

So, nevertheless, the Committee has rightly recognized that, boring or not, this is an issue that is worthy of attention. So, in my comments today, I want to focus quickly because I can see that the Committee is focusing on things that I think are important as well. My first point is that to correct the privilege log problem, the privilege log rule itself, Rule 26(b)(5)(A), and its accompanying Committee notes must make clear that detailed document-by-document privilege logs are not required in most cases.

The real issue today is that this is default. And I'm going to vary a little bit from what I have written here because I think it's important to give some context. This is happening while large document productions are happening. We are getting document requests, we are going through thousands, tens of thousands, sometimes hundreds of thousands of

documents, and in the process of doing that, we are identifying privileged documents.

It is very difficult to convince or even advise a client that in the middle of a case like this, we should go and bother a judge, who hates discovery disputes more than anything that -- that I can assure you, I have sometimes as national discovery counsel had a judge say either out loud or in every other way, oh, no, here she comes again, right, because they don't want to deal with discovery disputes. So you are left with the default document-by-document privilege log, or you have to go to the judge and say, hey, I think there's a better way.

Now the Committee's recommendations, I think, are great because they put that issue to the front. But, as Mr. Keeling pointed out, at the beginning of a case, you haven't started searching for those documents, you don't know what those documents look like. So, while it's helpful to bring it to the judge's attention early because at least you don't seem like such a gnat later on in the case, you've got to have something expressed when you say, judge, we should consider a different approach to privilege logging, this is what we suggest. The judge is going to turn to Rule 26 and say remind me, what are these

supposed to look like?

And instead of us having to argue there's a better way to do it from what really is the default, and I think LCJ laid that out well, we are able to say let's work together to come up with something that works. And I thought there was a great question about what categories can look like. And I think the flexibility is great. Mr. Keeling gave an example of how metadata can be easily identified, but I have offered that before. I have said I'll give you a metadata log because I'll tell you what's particularly burdensome in privilege logging, is having to give that detailed description of the document without giving away the contents of the document and waiving privilege.

And that's something -- I don't know if the technology question was answered, but that's something technology can't do, right? You need a thinking mind to go, we have a claim of privilege, and we say the type of privilege. So you can give to, from, you know it's attorney-client privilege. That's pretty easy to do. Then you have to have someone, a human, say how do I describe this document. It could be a long chain in an email. It could be an entire internal investigation.

So, if we were able to go to counsel and say -- to opposing counsel and to the judge and say, hey, we don't know yet what we're going to get, but we may have an idea, right? Some of us do this a lot and we may have an idea of at least the types of documents. We can come up with a plan. And we may say, hey, we will give you metadata logs only with a very general description. If you have questions, then we can go into further detail, because I'll tell you I had a recent case, we had 120,000 documents we produced; our privilege log was 35,000 entries. And what I got, which is what I often get, to be honest, was like a dartboard approach.

I had plaintiff's counsel call me and say, tell me a few things about a few of these documents that you've claimed privilege on, no discernible pattern, and I think that talking about a way to produce privilege logs that's not document-by-document is helpful to both sides. It allows for focused inquiries from opposing counsel because they can see categories, which, in my estimation, are much more helpful to them than to see -- and, again, the categories can mean a lot of things, but much more helpful to them than 35,000 entries.

So, if you have any questions, I'm happy to

answer those.

PROF. MARCUS: Well, I guess I'm asking this of many people. You think 23 -- the addition of some cross-reference, I take it, in 26(b)(5)(A) would be desirable? Am I right about that? That's sort of an intro.

MS. LARSON: Yes, yes. Absolutely.

PROF. MARCUS: Do you recognize that categories vary a lot depending on the kind of case? So I'm guessing that you wouldn't think a rule could say here are the categories or anything like that. Am I right about that?

MS. LARSON; I think it could perhaps be difficult, and I've listened in on some of the comments today and I'm very well aware that these rules have to be crafted not just for those doing MDLs or individual product liability cases but for a lot of different kinds of cases. I've certainly been involved in cases where I've had, you know, a five-entry log. But I do think just giving the flexibility and, again, emphasizing, as the 1993 Committee notes said so clearly, that this is not the default and, in fact, the more voluminous your production is, the more you must, for efficiency, because the time and money that is spent on these logs that I can tell you I can

count on maybe the addition of a second hand in my career how many times I've even had substantive inquiries from the other side. And yet I am billing my clients hours and hours to comply with the rule as it is default put into place by most courts. So I think it would be efficient and beneficial to both sides.

CHAIR ROSENBERG: Judge Jordan?

JUDGE JORDAN: I'm assuming you wouldn't be opposed to a reference to proportionality in 26(b)(5)(A), right?

MS. LARSON: Not at all.

JUDGE JORDAN: Then would you speak to Ms. Keller's objection to doing that, and I may not do justice to how she put it, but you were here when she was speaking, right? She said that that would -- if I understood her correctly, that would prompt or cause there to be a proportionality objection in virtually every case. So, instead of facilitating cooperation between counsel, it would actually be a hindrance to it and be problematic. Do have a response to that objection?

MS. LARSON: My response is I think the fact that she supports the other amendments makes her much more reasonable than a lot of opposing counsel, so I

look forward to maybe having her on the other side sometime because she's saying, if we have early discussions, we can come up with ways that are not document-by-document privilege logs. So I don't think -- I think whether it is by the use of the word "proportionality" or some other method, some other wording that the rule makes clear in either addition to 26(b)(5)(A) or in a note that the default is not document-by-document privilege log.

Whether the word "proportionality" is used, I would like that, but it's like the Committee note said in the 1993 Committee notes, it may be unduly burdensome to have a document-by-document privilege log when voluminous documents are claimed to be privileged, especially if they can be described by categories.

CHAIR ROSENBERG: Okay.

MS. LARSON: Thank you.

CHAIR ROSENBERG: Judge Boal?

JUDGE BOAL: And as the rules are currently constituted, you don't feel that you're able to argue proportionality if you had a dispute over the privilege logs?

MS. LARSON: I mean, in reality, since it's the default, we can certainly do that, but, again, in

reality, it's a little bit of a waste of any goodwill that we have with the judge. So most clients and, again, it puts me in a tough position even as sometimes discovery-only counsel to say we should really go to the judge because this privilege log is taking so much time and it's not helpful. And, honestly, it's a tool sometimes for delay and burden that the other side uses for us.

I mean, that's just the way that it is. So, as it's written right now, I suppose we could and we have, but as you can see, I think the LCJ did a great job documenting this, it's very unevenly applied, and in some jurisdictions, they'll just say no, our default and our rule is that we do document-by-document, if that answers your question.

CHAIR ROSENBERG: Okay. Thank you so much.

And Mr. Guttmann, who will address 16.1.

MR. GUTTMANN: Thank you. Good afternoon, and thanks for giving me the time. My name is John Guttman. I'm a principal at Beveridge & Diamond in our Washington office, and like everybody in our firm, my practice is environmental and toxic tort litigation. That's pretty much all we do. In addition, I am Vice Chair of DRI's Center for Law and Policy. Lana Olson gave a brief description of the

center as well earlier. We're basically the think tank, if you will, for DRI.

I'd like to begin by going back to the beginning to the statute, 28 U.S.C. § 1407. The statute says that the purpose of multidistrict litigation, and I'm paraphrasing obviously, is to promote the just and efficient conduct of the actions that are in an MDL. So any rule that the Committee proposes should be a step in that direction, increasing the just and efficient conduct of the litigation that's in an MDL.

Part of that, it seems to me, is to reduce the burden on the courts, and another part of it is to promote overall efficiency for the parties as well. In terms of reducing the burden on the courts, as opposed to increasing that burden, my suggestion is that the rule should put clear obligations on the parties, which is to say on their counsel, as opposed to requiring additional steps at the outset of the MDL from the court.

The proposed rule, 16.1, implicitly acknowledges, I think, that there is a problem with unsupportable claims in MDLs. Now I know there was discussion this morning about give us data that will support that and that will be provided to you. But my

point is to say this, that in an individual case, questions related to standing -- standing can be addressed at any point, obviously, but the initial inquiry, was there an injury-in-fact? If there was, is it fairly traceable to the conduct of the defendant? And is the claim plausibly at least within the statute of limitations? Those questions are typically dealt with at the outset of an individual plaintiff case.

It's a different situation in an MDL because they may not be dealt with in terms of particular cases in the MDL for 18 months, two years, even longer down the road, depending upon how the MDL moves, and some of them move at glacial paces. They are very difficult for the courts to manage. But there must be standing for each plaintiff and for each claim brought by each plaintiff just as there is in an individual plaintiff case. That's obviously the law, which I don't need to tell this group the precedent for that.

So why are unsupportable claims being filed? And the data will show that they are. There are multiple reasons why that can happen. One of them, plain and simple, I think, is lack of care on the part of the lawyer filing the claims. A second is -- and in that regard, let me just say, you know, we do live

in an era where you turn on your television and you see ads soliciting plaintiffs to file lawsuits. Claims get filed. Do they get the diligent examination pre-filing that they should get? The data will show that not necessarily.

Also, there's an incentive in many instances for a lawyer to file as many claims as possible. If you've got a lot of claims, you are more likely to end up as the lead counsel, liaison counsel, the terminology varies from MDL to MDL obviously, or on a plaintiff steering committee. In addition, the more claims there are filed in an MDL affects what might happen in the pot, to get right down to it, in an early settlement.

So there are reasons, I submit, to, right at the outset, assess whether or not claims are even plausible. The rule should provide a mechanism for the parties and the court to assess the scope of the MDL, and that means to assess the viability of claims, and that will enable the transferee court to decide on approaches to discovery. It enables the court and the parties both to have a good sense of, is there a possibility of an early settlement in this case? What would that involve? Getting your arms around the size of the thing is an essential predicate to having that

kind of conversation.

I know you heard earlier about MDL 2885. That's the 3M earplugs, hearing protection MDL, so I'm not going to go into that at length except to say this. That MDL was established in 2019. We're just about at the end of 2023, we're in the fall. There have been 16 trials in that MDL, I think, at least as of the last time I checked. But we're still seeing the court threaten sanctions against lawyers for the fact that there are claims that are baseless sitting there on the docket.

I'd also point the court to MDL 2873. That's the aqueous film-forming foam litigation, the firefighting foam litigation. That one was filed in 2018. And we're involved behind the scenes, we're not out front in that one for a variety of reasons. But I talked to somebody on Friday who's working on it, who said, you know, we're getting five, six dismissals a day now of claims that were brought some time ago and have been kicking around, influencing the size of this MDL.

I've been involved in MDL 1358, which is the MTBE litigation, since it was filed in 2000. That's now, I believe, the second oldest MDL in the federal courts. Only asbestos is older. We have different

kinds of cases than we had in kind of the first half of it chronologically. Now it's all cases brought by states, they're very different. But there was a period where it was all cases brought by people with wells, public water providers, individuals with private wells, and there was a painstaking process to sort out who's got a real claim as opposed to simply feeling threatened.

If you have a claim and you're bringing a claim on behalf of multiple well fields, are they all really contaminated? Or are some of them not contaminated? And if they're not, why are they in this case? Because they influence the dynamics when you start talking about settlement. In a lot of these cases that we deal with in the environmental area, it's not just how many plaintiffs are there but how big is the contaminated area or how many wells are contaminated. Those kinds of things are very, very significant in terms of influencing the parties' and the court's assessment of how big the whole thing is.

CHAIR ROSENBERG: Mr. Guttmann, let me pause and just see if we have any questions from our reporters.

PROF. MARCUS: Well, I'd like you to elaborate on what we've been urged by folks in

medical -- in pharmaceutical and medical products is to insist on certain things. Would the same things be applicable in a toxic tort situation that might be applicable there? Is there an across-the-board requirement that would fit the cases you work on?

MR. GUTTMANN: Yes, but I think it's all MDLs. So, if we have a consumer fraud case, it seems to me the same issues might be present. And so my suggestion to you is that any requirement imposed on the parties, imposed on the counsel filing the claim has to be generally worded and really boils down to this, do you have a -- is there a good-faith basis that you as the lawyer have for asserting that your client is injured, for asserting that the injury is traceable to the conduct of one or more of the defendants, lots of times there's multiple defendants, and that it falls within the statute of limitations.

Now I know that when filing a complaint, a lawyer is subject to Rule 11, obviously, but the fact of the matter is, if the rule and the comment were to have something that specific and in the comment a reference to this filing, just like everything else is subject to Rule 11, there ought to be a deterrent effect that would lessen, at a minimum, the number of bogus claims that are filed in some of these MDLs.

CHAIR ROSENBERG: Anyone else have questions? Judge Proctor and then Andrew.

JUDGE PROCTOR: Yes. As said before, thank you. Is there something we can do that would communicate the importance of this issue without putting everyone in the same box and the law of unintended consequences for creating this fabric of litigation that's unnecessary in some, if not many, cases? And I'm wondering about maybe particularly with respect to the comment language.

MR. GUTTMANN: I think, at a minimum, it would advance the ball if the comments were to reference the attorney's obligation before filing to conduct a preliminary investigation in all cases in the MDL. The tricky part is the second piece of my argument is it helps everybody if those issues are addressed early, right at the outset of the MDL. And that's where anything more than imposing on the lawyers an obligation to file something in the MDL at the outset, it makes it hard because anything else imposes obligations on the court. And I think that these cases are incredibly burdensome for judges, so that's why I'm focused on trying to impose a burden, an obligation on the parties, not on the court.

JUDGE PROCTOR: I picked up on that.

CHAIR ROSENBERG: Andrew?

PROF. BRADT: Thank you very much. You raised a point that I don't think has been raised earlier about the unsupported claims issue, and that's that it may have an effect on who's appointed as leadership counsel. And I just wanted to know if there's evidence of that that you could show because often what we hear is that you have repeat players who are lead counsel, and those don't seem like the kind of folks who you're describing, who would increase the number of claims filed in order to get that appointment. So I'd be interested if you could demonstrate that causal link.

MR. GUTTMANN: Well, I certainly don't want to, you know, cast aspersions on particular lawyers, but I can say this, that I have seen in MDLs cases where lawyers filed claims that ultimately were dismissed for lack of standing with that attorney having, prior to the dismissal, served as the lead voice for the plaintiffs.

CHAIR ROSENBERG: Any further questions?

(No response.)

CHAIR ROSENBERG: All right. Thank you so much.

MR. GUTTMANN: Thank you for your time.

CHAIR ROSENBERG: Much appreciated.

Mr. Halperin, who will address 16.1 as well. Welcome.

MR. HALPERIN: Good afternoon. My name is Greg Halperin, and I'm a partner at Covington & Burling in our product liability and mass torts practice group. Although much of the discussion of Rule 16.1 today has been focused on (c)(4), I'd like to focus on (c)(5) and ask the Committee to, at a minimum, clarify two things in the notes: first, that master and short form complaints taken together must satisfy Rule 8 and, where applicable, Rule 9(b), and second, that defendants must be afforded an opportunity to seek dismissal of the master complaint under Rule 12.

Now Rule 8(a)(2) applies to all civil actions and proceedings in federal court and it requires all complaints to allege facts showing that the pleader is entitled to relief. Because the master complaint necessarily lacks allegations about any particular plaintiff, the short form complaint must contain sufficient individualized allegations that taken together with the general allegations in the master complaint provide defendants fair notice under Rule 8.

But, in my experience, as my experience in MDLs has shown, this is rarely the case. To make sure my experience was not an outlier, I pulled the short form complaints in the 10 largest MDLs pending as of last month, which collectively represent 91 percent of all MDL master complaints -- all MDL member cases anywhere in the country. Nine of those MDLs use short form complaints, and most of them, in my view, do not meet basic pleading requirements.

In the talcum powder MDL, the second-largest active MDL today, although the master complaint alleges that plaintiffs were diagnosed with various forms of cancer of the female reproductive system, the short form complaint simply requires a plaintiff to allege that she experienced a "talcum powder products injury, without any specification of what that injury actually was." This basic 8(a)(2) requirement is reserved for a plaintiff profile form that was not ordered until three-and-a-half years into the litigation and, even then, initially for only a subset of plaintiffs.

In the 3M earplug MDL, the largest active MDL today with over 240,000 member cases, the short form complaint provides no information about when the plaintiff allegedly used 3M earplugs. In the Bard

hernia mesh and IVC filters MDLs, the third and seventh largest MDLs, respectively, the short form complaints do not identify the date of injury.

This basic timing information precludes assessment of whether cases were timely filed within applicable statutes of limitation and repose, and in six of the 10 largest MDLs, the court permitted plaintiffs to plead fraud claims via short form complaint by simply checking a box to opt in to the fraud allegations in the master complaint. Such an approach cannot be squared with Rule 9(b), which necessarily requires individualized allegations substantiating that a plaintiff heard and relied upon the alleged fraudulent or fraudulent statements.

So, if Rule 16.1 is going to expressly authorize consolidated pleadings, which as folks have indicated today are not listed in Rule 7, I ask the Advisory Committee notes to provide guidance that master and short form complaints are collectively subject to the same pleading requirements as Rule 7(a)(1) complaints. This is especially needed, I submit, in light of (c)(4), which could be read to suggest that it is okay for plaintiffs to avoid providing the factual allegations in their claims in their complaints and instead do so later.

That takes me to the second point. Consolidated pleadings should not prevent defendants from moving under Rule 12 to dismiss master complaints that fail to state a claim. Without guidance in the federal rules, courts have taken varying approaches to motions to dismiss consolidated pleadings. Some have interpreted them only as administrative devices and barred defendants from filing motions to dismiss them.

Others have permitted motions to dismiss but expressly ruled that the sufficiency of the claims set forth in the master complaint are to be viewed with, "substantial leniency." And, finally, some courts have treated motions to dismiss the master complaint no different from a motion to dismiss in any other case. In light of Rule 1 and in light of the purposes of MDL proceedings to promote the just and efficient conduct of civil actions pending in different districts, I believe the third approach is the right one.

The first approach requires defendants to file identical motions to dismiss in hundreds or thousands of individual cases, which is neither just nor efficient. And nothing in the federal rules supports putting the court's thumb on the scale against dismissal, as the second approach does, simply

because lawyers have recruited hundreds or thousands of plaintiffs to bring the same claims.

If the federal rules are going to go into encourage consideration of consolidated pleadings, the Advisory Committee notes should clarify that those consolidated pleadings are not immune from challenge under Rule 12(b)(6) or subject to a standard of review that is different from any other complaint filed in federal court.

Thank you. I welcome the panel's questions.

CHAIR ROSENBERG: Thank you. So can I -- I think your comments are very straightforward. I want to make sure I understand them. Primarily, are you suggesting that there should be additional language in the notes, one, to address the fact that the short form complaint, in conjunction with the master complaint, to the extent short form and masters are used, must meet Rule 8 and Rule 9(b) pleading requirements, mention of that in the notes? And, secondarily, in the notes, that to the extent the MDL is going to provide for consolidated complaints, that motions to dismiss under 12(b)(6), allowing for master complaints does not preclude the ability to file motions to dismiss under 12(b)(6) or something along those lines? I mean, is that, in essence, your two

main points?

MR. HALPERIN: Absolutely. I defer to others' testimony on other aspects of 16.1. But I think those two additions to the Advisory Committee notes on (c)(5) would go a long way towards making (c)(5) more administrable and short form complaints solve a lot of the ambiguity about those issues that are percolating in the courts today.

CHAIR ROSENBERG: And you think (c)(4) arguably is ambiguous insofar as it might suggest or lead one to believe that you don't need to comply with Rule 8 or 9(b) but rather exchange it so that maybe a note along (c)(4) to clarify that that is not in lieu of a pleading requirement?

MR. HALPERIN: I think that's important as well. (c)(4)'s when language, I think, could be read to mean that you don't have to allege the stuff in the complaint because it's going to come later.

CHAIR ROSENBERG: Okay. Thank you.

Judge Proctor?

JUDGE PROCTOR: Yes. I'm just curious, how do you think your approach or suggestion squares with Footnote 3 in the Bank of America opinion, where the Supreme Court said there's really two purposes these master complaints can serve. One is to essentially

consolidate the pleadings into a single document, or the second approach would be more of an administrative summary of the claims that doesn't have legal effect but advances just organization of the claims that way.

MR. HALPERIN: Sure. With respect to the Supreme Court, I don't understand the administrative purpose of a master complaint. I think, if a document is going to be out there setting forth what the claims are in the litigation, it has to have some effect in the litigation, it can't just be an administrative device. You know, if you were taking an individual complaint, they can number in the hundreds or even thousands of pages for a single plaintiff and there's no summary administrative complaint to have non-binding, helpful summary effect of that complaint. So I don't see the purpose of an administrative complaint in an MDL any different from any other case.

CHAIR ROSENBERG: Andrew?

PROF. BRADT: Thanks. I'd just like to clarify the 9(b) part of it. So 9(b) says in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. And so, if the gravamen of the fraud is in the master complaint, I guess my question is, are you saying that the individual short form complaints have

to include more than that?

MR. HALPERIN: No, and I'm not saying they have to -- you know, the fraudulent statements should be in the master complaint. What's missing from the master complaint is, did the individual actually hear those statements? Did the individual rely on those statements to their detriment? And that information can't be in a master complaint because it requires individual facts. So that's what I think needs to be in the short form complaint tying into the allegations of the master.

CHAIR ROSENBERG: Any other questions?

(No response.)

CHAIR ROSENBERG: Okay. Thank you so much.

MR. HALPERIN: Thank you.

CHAIR ROSENBERG: And next, John Rosenthal, who will address privilege logs. Oh, no, no. Mr. Ratliff, sorry. Sorry about that, Mr. Ratliff, who will address 16.1. And then Mr. Rosenthal, who will address privilege logs, and then we will take a break.

MR. RATLIFF: Good afternoon. I guess, first, my name is Harley Ratliff. I'm a partner at Shook, Hardy & Bacon. Second, I appreciate the time to speak before you and the effort that has been put on by the Committee in addressing these rules. Third,

going this late in the day, what I've learned is my pre-prepared comments have been thrown in the trash and I'm going to try to answer some of the questions I heard earlier, which is, one, talking about (c)(4). Is there some sort of empirical data as it relates to unvetted, unexamined claims?

I think trying to put that data together across multiple MDLs is difficult, but I do want to point out an MDL that I think is illustrative of the issue. So I am currently in an MDL that is going to in one month hit its seven-year mark. What we know and what is undisputed from plaintiffs' fact sheet data is 80 percent of the inventory of the, at one time, 16,000 cases, 80 percent have never seen a doctor for the injury they allege and 80 percent have never been diagnosed with the injury that they allege, an injury that is claimed to be a signature injury and one that is diagnosed. We are seven years in and more than 80 percent of the cases have no proof that they have ever been injured. We also know through the fact sheet process that another 3,000 cases have been dismissed through a show cause process either because they did not have product ID or because they didn't even fill out the fact sheet itself.

And the cost there has been a federal judge

who has worked tirelessly for the last four years having a show cause process every single 90 days, which means we have to put people on deficiency notices, they have to respond, and then she sits down and goes through the cases one-by-one every 90 days for either a half-day, full-day, or two-day hearings.

That is a cost on our clients and it's a cost on the federal judiciary. And so, to kind of put things into perspective, if the proposed 16.1 Rule was more of a gatekeeping function, like I think my colleague, Mr. Shepherd, talked about, do you have just these basic elements of proof? Or what LCJ recommended, which I think is general enough to cover all MDLs? Had that been in place seven years ago, what kind of MDL would we be looking at now?

CHAIR ROSENBERG: Do you think -- may I interrupt?

MR. RATLIFF: Sure.

CHAIR ROSENBERG: Mr. Halperin's suggestion, do you think if there was language in the notes that made it clear that the expectation was that the master and/or short form or in combination must comply with Rule 8 and Rule 9(b) applicable pleading standards, that that would address this problem you're raising?

MR. RATLIFF: I think, candidly, Your Honor,

it would help. I don't think of it as a panacea in the sense of having some type of 16.1 that does have a gatekeeping element to it. So, when it comes to the notes, what I think would be helpful, because I've heard concern about how do we draft something that's generally applicable not just to mass tort or products MDLs but to all MDLs, I do think there is a place in the notes to say this problem or this issue may arise or may be more acute in these types of litigations than in other litigations.

And I think it's also fair perhaps in the notes to say this is something that the parties, maybe it's an antitrust litigation, maybe it's an airplane MDL, this is something the parties can waive or discuss because they may not need this. But I think, when we're talking about mass tort product liability MDLs, the practical reality to me is there is not only a huge cost to our clients, but there is a huge cost to the federal judiciary. And I think the other reality that gets lost in this is -- and I put this in my comments -- is all of these volume of claims, they overshadow the claims where there might actually be a controversy to litigate. Now we may disagree, but if you're talking about litigating 350 claims or 350 lawsuits, where everyone has been diagnosed with the

injury and they've taken the product, versus 16,000, well, now we're litigating the real issues and we can really get to the bottom of things.

CHAIR ROSENBERG: But aren't the -- I'm just curious -- and I don't necessarily disagree with anything that anyone has said about -- and I think that has been, you know, a comment we've heard on our speaking and listening tours over the past several years that nobody's in support of unsupportable claims. The plaintiffs aren't -- at least the plaintiff attorneys from whom we've heard and the defense isn't, but, I mean, the legal issues are the legal issues, aren't they? So whether you have 16 or 1600 or 16,000, if sort of preemption is an issue, is that really going to affect the briefing of the issue and the judge's ruling on the issue on a legal issue?

Again, it's not -- they're not necessarily mutually exclusive. There could be insurmountable unsupportable claim problems, but I just want to make sure we're not conflating the two. I mean, at the end of the day, you just need, you know, maybe one viable plaintiff's claim to generate, you know, a preemption argument and it's going to be equally necessary and applicable whether it's to one, 16, 1600, or 16,000, right?

MR. RATLIFF: Yes, Your Honor. I think that presupposes that I'm going to win every preemption argument that I bring before the court, which I think is unlikely. And so the --

CHAIR ROSENBERG: Okay. So you're talking about if you're -- so you're not precluded from raising the argument and you're not precluded from winning the argument, but if you don't win the argument, now you're facing now this problem of am I facing 16, 1600, or 16,000?

MR. RATLIFF: Correct. I think you're facing the black box problem, which is what is in here?

CHAIR ROSENBERG: Right. But summary judgment and Daubert, that actually -- those are also legal issues that don't necessarily relate to how many claims, which I think goes back to Judge Proctor's question a little bit, which is, is this more of an issue for when defendants are being asked to settle claims and it's very frustrating for defendants, we're hearing, to be asked to settle the claims, when many, some claims aren't supportable, and maybe the defendants don't feel armed to know which ones are supportable and which ones aren't. And so we should put something in the rule to either prevent them from

ever being filed, which raises a question, can we actually -- is there such a thing? Or second, like you judges need to do something. But then we've gone down that path of, well, do you want us to go claim by claim by claim? And would you all want to file 16,000 motions to dismiss? Would you want to do that?

MR. RATLIFF: Well, we try and address that sort of in turn. I mean, I think, if you had some sort of gatekeeping 16.1. on the front end, you're not talking about 16,000 motions for summary judgment.

CHAIR ROSENBERG: So the gatekeeping, meaning like something in the notes that says you've got to comply with Rule 8 and 9(b) and the implication is, if you don't, like, anytime you don't comply with the rule, you may be subject to sanctions?

MR. RATLIFF: Do you have the product? Did you take the product? Do you have the injury? That should be a threshold issue that should be how do you get into this MDL? You know, it's in --

CHAIR ROSENBERG: Is that synonymous with Rule 8, though? Do you think Rule 8 would require somebody to say I have an injury, I took this product and my injury is a result of this product? Is that another way of saying comply with Rule 8?

MR. RATLIFF: Correct.

CHAIR ROSENBERG: Okay.

MR. RATLIFF: Correct, Your Honor, as it relates to the resolution problem. And I think one of the questions or comments I heard is, well, is there really a practical problem of having these cases unexamined, unvetted, however you want to describe it, parked in these MDLs? The answer to that is unquestionably yes. And when you talk about the resolution piece, so I have had, and I hate to be anecdotal about it, but it's factual, and I think everyone in this room has had the same experience, is you go and you say, look, we're going to try and get out of this litigation. We're kind of at an endpoint. We'd like to talk about resolution, you have X number of cases, we've looked at 20 of them. These have no value.

And the comment we get back time and time again is you're correct; these have no value. These are dog cases, if you will, to use a little colloquialism. But they say, I've already put $3,000 into this case because I had a filing fee and I collected some medical records. I'm getting that money back. And so this case, which I acknowledge to you is worthless, we're eye-to-eye here, it's going to cost you something, and then it becomes an economy of

scale.

So maybe you pay a few grand to get rid of one worthless case. But, when you're talking about 12,000 of them, 20,000 of them, 50,000 of them, that becomes real money. And I think, at the end of the day, that obscures the ability to potentially resolve and compensate individuals who may actually have the injury and took the product. And you say this is a case that perhaps we want to get out of.

CHAIR ROSENBERG: Judge Proctor, do you --

JUDGE PROCTOR: Yeah. I just think what you're saying makes a lot of sense. I understand particularly when you get into the exponential multiplying of these cases. I guess what we've been struggling with for five-plus years now is the different ways even the defense bars approach this. We've heard from the defense bar there should not be any encouragement by an MDL judge to settle cases. That doesn't make a lot of sense because settlements save the bench and the bar and the courts time and money and headaches. That's straight from Newburg.

We've heard also, hey, we need to have some rules set in place where we can figure out what these claims look like so we can tackle settlement. And I think that's kind of what you're getting at here is we

shouldn't be expected to settle these frivolous claims.

So, you know, I tried to raise this point previously, I don't know that it fell on listening ears, but it seems to me there are points along even the MDL spectrum where frivolous claims can be dealt with. It's just -- it's not always conducive to handling those right off the bat in the first 60 days of a case is what our transferee judges push back and tell us. That's not to say there aren't cases where they aren't willing to do that, but I think they've been -- you know, when we met with them last year and the year before at the transferee judges conference, they said please don't put that burden on us to do it in every single case. So how do we navigate that?

MR. RATLIFF: So, Your Honor, I think you're correct in some respects. There is obviously an avenue to do that. In my experience, we have had a comprehensive fact sheet process, we have gone through a show cause process, we've gotten lots of cases dismissed. The question to me, though, becomes, yes, there is that avenue, there's also dispositive motion practice. But the practical reality is, when you have that many cases, I haven't had a judge allow us to file summary judgments or motions to dismiss in every

single individual case, and now that burden is going to be taken back to the remand courts to address all of those, and I've been in front of remand courts that say, why wasn't this -- what am I -- why do I have this case? Why are we addressing this now?

And so I think it's kind of maybe two-pronged, which is, yes, there are mechanisms, but I do think there is certainly a procedure or -- and maybe this is something that gets negotiated with the court, but if they have the encouragement from Rule 16.1 to say at some point early in the litigation, there needs to be, whether you want to call it a lone pine, whether you want to call it a show cause process, you need to come forward with just the basic elements of information that you should be in this court altogether because it is not like what you see in one-off litigations or one-off cases, where oftentimes you're contacted by the plaintiff's attorney and they say here is the injury; here's the product, we have proof of all of this, would you like to talk resolution now or would you like to litigate it? That just does not happen in MDLs.

And to talk about the resolution piece and that's one other part that I wanted to mention very briefly as it relates to (c)(9). I know Rule 16 talks

about facilitating settlement, and I think that is a worthy goal certainly in individual cases. I know my home district, the Western District of Missouri, there is a mandatory early settlement conference. I think that has value there.

I do think there is a problem, and if you'd give me just a second to explain, with making the idea of resolution in these big MDLs paramount right from the get-go that sometimes can be very counterproductive and why I think maybe it should be excised from the proposed rule, which is this. In our MDL at the very beginning, the very first status conference, the presiding judge, and I think it was well-intentioned and well-thought-out, said I'm going to have a settlement committee for both sides and it can't be people in the trenches. We're going appoint settlement committees. That was the very first thing we did. Once that order came out, if you Googled the next day our product and settlement, all you saw were advertisements saying settlement committee appointed, settlement imminent, and we track the data very analytically at our firm and what we saw was hundreds and hundreds and hundreds of cases being filed in seriatim over the next several months.

So I do think there is value in the

judiciary and MDLs being involved in the resolution piece unquestionably. I do have some concern about the way the rule is drafted, and maybe it's just the way I read it, of making it something that is paramount from the get-go. I think it's something that maybe a little more water under the bridge needs to happen before the presiding MDL judge starts to address that with the parties.

JUDGE PROCTOR: So one quick follow-up.

MR. RATLIFF: Yeah.

JUDGE PROCTOR: I can't count on all the fingers that are in this room the number of times I heard this while I sat with the panel: we're going to send this case off to X district to Judge Y and Judge Y doesn't have to do everything in this case, Judge Y can be surgical, deal with the centralized issues, the coordinated proceedings, deal with discovery, deal with this general causation issue, deal with the Daubert issues, whatever the case may be for deficiency, and then the other issues can be sent back to the transferal courts, we'll remand them back for that.

I think that's part and parcel of what's been built into the MDL statute from day one. And maybe some criticism is MDL judges try to do too much,

try to handle everything, but how do you square a one-size-fits-all, we have to deal with purportedly unsupportable claims in the beginning of a case in a case where the panel just sends it for a particular surgical reason to deal with things in a centralized proceeding and then everybody expects that it's going to be remanded back?

MR. RATLIFF: That is a fair question. And I think the practical reality is, because I've heard those same arguments before the panel, I have not made them myself, but I probably drafted those types of comments to people who have made those comments before the panel, is that I think there is sort of an ideal world where that would happen, but I think the practical reality is that MDLs are messy and judges are trying to wrap a lot of these cases up in a bow because I think there is a feeling that -- and this is a perception -- that if cases do get remanded, that it's somehow seen as a failure of the MDL.

I don't think that to be the case. Where I think there is maybe a shortcoming is what cases are being remanded and should those cases have been there in the first place? And we shouldn't be letting cases come in in 2013, sit parked for eight years, 10 years and then be unleashed out into the wild and then, all

of a sudden, you have remand courts saying what is this case and we're starting from ground one. That would be my response to that.

JUDGE PROCTOR: And that's a fair response to a question. Thank you.

MR. RATLIFF: Okay.

CHAIR ROSENBERG: To a fair question. Thank you so much. Oh, Judge Bates. Don't go yet.

JUDGE BATES: I have one little question. Your concern about settlement seems to be a timing question more than anything else. If (c)(9), which currently says whether the court should consider measures to facilitate settlement, et cetera, simply said whether and, if so, when the court should consider measures to facilitate settlement, would that take care of the concern you have?

MR. RATLIFF: I think that would certainly help. My concern, and I only speak for myself here, is that coming out hot at the outset at the initial case management conference and saying, well, let's talk about resolution now, let's get this going, I think, is counterproductive. And there's a feeling on my side that sort of feels like, wow, liability has already been a little bit presupposed. And then, also, I think it perhaps sets unrealistic expectations

for the attorneys who have filed these lawsuits until we've had a little bit more time to see how all of this is going to shake out. So, yes, I think that would be a helpful step.

CHAIR ROSENBERG: We might let you join the drafting committee. No, thank you. You probably don't want to.

MR. RATLIFF: No, it sounds great. I'd be happy to.

CHAIR ROSENBERG: Okay. Thank you so much.

And, Mr. Rosenthal, if we can hear from you before our mid-afternoon, we'll call it late afternoon break, on privilege logs.

MR. ROSENTHAL: Good afternoon. Thank you for the opportunity to speak to the Committee. Also, thank you for your tireless efforts and dedication to help improve our judicial system through rules reform. In order to put my comment in perspective, I'm 30 years out as a complex class and MDL litigator. I also chair our e-discovery and information management practice group, where we do about 250,000 hours of e-discovery, a significant portion of which has to do with privilege review and privilege logging.

Beyond that, I'm a former steering committee member of the Sedona Conference, and while there, I

was editor-in-chief of the Sedona Conference's commentary on the protection of privileged ESI. In 2016, the Sedona Conference wrote procedure and process for protecting privileged ESI from production is broken. We went on to say that privilege logging is arguably the most burdensome and time-consuming task in litigation. We also went on to say that modern privilege logging is as expensive as it is useless. Those statements are true in 2023.

The single largest cost component in any civil litigation is privilege review and logging. Let me say that again. When you break down all the expenses of litigation, the single largest cost component, and this is across all litigation -- I handle MDLs to landlord-tenant cases within our group -- it's the single largest cost component, and I think it's broken. I think the current proposals go a long way in helping that, but consistent with Judge Facciola, Jonathan Redgrave and LCJ's position, I would advocate we need to do more. Some of what I am advocating is consistent. Some is a little further.

So the first thing is that document-by-document logging has become the de facto. I go into meet-and-confers, the other side doesn't want to even discuss other types of logging processes. You even go

to court. We have many standing rules and local rules that say, if you do not produce a log that has X, Y, and Z document-by-document, there is a presumption of waiver.

I think and I would humbly suggest that we need to revise in addition to the proposed amendments 26(b)(5)(A), and I think we should revise it consistent with the language suggested by Judge Facciola and Jonathan Redgrave. Moreover, I think we should revise the Committee note to make it abundantly clear what was already in the rules in 1993 but seems to have been lost by many practitioners in many courts, that document-by-document logging is not the de facto standard.

I would also encourage the Committee to put in the Advisory Committee note an encouragement that the parties look to other means to log documents, and a few examples: categorical logging, metadata logging, and what I'd call categorical logging plus. A lot of times, and you've heard it here today, well, if we get categorical logs, that's really an effort to hide documents, we don't get the information that we need.

And that could be a fair comment. But I have used, over the years, as early as 2009, where Judge Facciola endorsed in Redgrave surcharge, kind of

a categorical log plus, where in the first instance, we produced categorical logs, or metadata logs, or what we call objective logs. And then based upon a good faith basis, the other side, the receiving party has the right to come back and say well, that's great, but for this category, or this subcategory, I need document-by-document. I think if the Committee would about in the Advisory Committee notes, these different options, it would move the ball forward.

In terms of other things that I would suggest should be in the 26(b)(5)(A) comments, one is a rebuttable presumption that certain kinds of information need not be logged, such as information after the date of the complaint. I would suggest there should also be some guidance as to what should be in a log. The case law is all over the place. The majority of the case law does spell out the categories that need to be in there. But I can't tell you the number of times I have to meet and confer and then litigate what should actually be on the log.

The next issue is that discovery is transforming from emails to chats. And the volume of information subject to discovery in most litigation is either email or chats. And there is a huge, huge fight going on between whether top level logging is

appropriate. And most receiving parties are pushing back and saying you should not do top level logging.

So if I have an email with 40 parts in the chains, they want 40 entries in the privilege log. I would I would suggest the Committee could add a provision endorsing the use of top level logging, or what I would call top level logging plus, the same kind of issue. You can get a top level log and then it's based upon good faith.

The last one is a novel thing. I believe that 502(d) has been underused in many respects. And I've written extensively on that and talked extensively on that. But I would encourage the Committee to put into the advisory committee note an encouragement that the parties should consider, and the court should enter, a 502(d) that says the contents of a privilege log cannot be used as a basis of where. I think 502(d) allows for that and part of the issue is on the defense side or producing parties, we're concerned that if we put too much in a log, that'll be used as the argument is waived.

So I think we can improve the quality of logs and the dialogue around this issue by encouraging broader use of 502(d) for this purpose. Happy to answer any questions. I'm also happy to answer the two

questions that have been posed on technology and proportionality.

CHAIR ROSENBERG: Okay, thank you. Let me check.

Rick?

PROF. MARCUS: I'm not sure if you said this at the beginning, I was out of the room. I know in earlier events that we've attended, you've emphasized that some of your opposing counsel adamantly insisted on document-by-document without regard to any other considerations. I wonder if you haven't dealt with that fine, but otherwise, could you elaborate on the importance of making it clear in 26(b)(5)(A) that that's not required, going back to the 1993 note, which sort of said that? I think that's a point worth pursuing a bit further.

MR. ROSENTHAL: Yes. I don't -- further, I don't think it's just practitioners, I face that with judges, magistrate judges and special masters all the time. They believe that's the de facto standard. And, in fact, there's a waiver if you don't. I think it would allow a lot more leeway in the meet and confer if it's clarified that that is not de facto; that's not a requirement under the rules. And I think the Facciola Redgrave language, in addition with some

revisions to the note, would get us there.

CHAIR ROSENBERG: Judge Bates?

JUDGE BATES: Perhaps with respect to the 502 issue, but certainly with respect to the rebuttable presumption that you suggest with respect to some items, aren't those more statements of substantive law that you would be asking to insert into a rule of practice and procedure as to what is privileged, for example?

MR. ROSENTHAL: Well, I'm not advocating it -- it could be construed that way. I'm not advocating it to put it in the rule, I'm advocating it to put it into the Advisory Committee notes. I think that what we've seen since --

JUDGE BATES: That makes it even worse.

(Laughter.)

MR. ROSENTHAL: It could be, but I think what we've seen since 2006, is that the comments in advisory committee notes have gone a long way in changing actual practice on the ground.

CHAIR ROSENBERG: Okay, thank you so much. We really appreciate your comments. So let's take a mid-afternoon break. It's 3:06. Let's be back at 3:16 for our final three commenters, from whom -- or witnesses from whom we are very interested to hear

from.

Keep in mind, obviously, we've heard from 19 people, so if you could hone in on anything you think hasn't been said or a response to what someone else has said that you will either agree or don't agree, that would really help. You could kind of think of yourselves as sort of the wrap up. It's not to take anything away, but that would be very helpful and I think good use of our time. So we'll see you back in ten minutes.

(Whereupon, a brief recess was taken.)

CHAIR ROSENBERG: Rule 16.1. Oh, you're just gonna speak about 16.1. Okay. We're looking forward to hearing.

MR. JOYCE: Okay. Thank you. Well, thank you to the Committee and I appreciate very much the opportunity to be here. My name is Sherman Joyce. I'm president of the American Tort Reform Association. Let me just say at the outset, this is a new forum for me. My organization frequently testifies for before legislatures and Congress. We often filed amicus briefs before the federal and state courts, but this is a confluence of events that we're here, and I'm delighted to have the opportunity to present some thoughts and I will adhere to your admonition to be

brief.

No one's ever complained when I've been too short, so I will attempt to do that. But to focus on some key issues and not sort of cover ground that's been much more effectively covered than I. Just at the outset, again, I'm not here to talk about our personal experience in litigation, but to offer our perspective on these issues and how we look at it within the broader legal reform community.

At the outset, I would just say that we do associate ourselves and endorse the perspective presented by Lawyers for Civil Justice, an organization we work closely with. In particular the issue of claim sufficiency, we see as central, not just to the issue for you, that you're considering in this process, but to us as well because we think that this is -- the whole mass torts issue is creating a broad issue, and it's of great interest to the membership of my organization. I appreciate the opportunity to talk about that.

I think Mr. Guttman talked about the fact that the data will be furnished to you about the actual number of cases that don't -- that shouldn't be brought in the context of MDL litigation. I can just attest that from the input that we get from our

members who are involved in these cases, that seems like a very solid piece of data. And obviously, it's what was reflected in the work, not just of your subcommittee on MDL, but also some of the observations that other members of the federal bench have made in public statements, again, which we look to implement in terms of our perspective.

As I said, our member companies, those that we work with closely believe that a very, very powerful force in the impact of litigation is simply the volume of the litigation. And that's why we think it's so important that you're doing what you're doing.

What I thought I would do is spend a few minutes just providing a little bit of a different perspective. And that's from the external factors that I think are often in play. They're not directly relevant to your jurisdiction, but we think that they're important from the perspective of what's actually some key factors in driving the litigation.

The reality is from where we sit, that there's really a very active and growing external industry that's grown up around the mass torts litigation, certainly, if you contrast it to litigation back when the MDL statute was enacted in 1968, it's very visible to us. You've heard some

reference to it today. An estimate that we prepared, my organization, between 2017 and 2021, nearly $7 billion was spent on advertising. And that's probably --

PROF. MARCUS: What was that number again?

MR. JOYCE: The correct number is $6.8 billion. It's in a reference in my statement. I will submit the full statement in a report that my organization prepared. That's overall advertising to promote litigation. But in the mass torts world, I think it's important to look also specifically at some of the more significant cases, $131 million on Round-Up, $122 million on Xarelto, $111 million on talcum powder.

Why does this happen? I actually had an interview recently, someone asked why is this done, and the answer is simple, it works. It generates claimants, and that's the important part. Lead generators, as you know, you've heard a little bit have call centers that collect medical information, they sell that information to the lawyers. That's the way it works. That's the business side of this.

Another key component of this is the litigation finance world. I'm old enough to remember my older son graduated from law school a couple of

years ago, we've contrasted sort of the difference in different theories about who should and can have a role in litigation. I know it's an important issue, not right before the court or right before this committee now, but it is an important consideration.

The fact is that you have these litigation finance companies taking a stake in these lawsuits, actually having a role in them. And they obviously are, it's been clearly demonstrated, providing capital to underwrite the advertising that I was just mentioning. One data that I saw, as we were doing some research on this, is a company Westby Advisors has estimated that between 2019 and 2022, the litigation funding industry increased by 44 percent. So those are external factors that I think as you consider your role, and this important work that you're doing with Rule 16.1, is something to keep in mind. This is not -- they are, we believe, responding to the opportunities. Your subcommittee talked about the Field of Dreams, if you build it, they will come. They are responding to that field of dreams.

CHAIR ROSENBERG: Thank you. Let me see if there are any -- take a pause, see if there's any questions.

Rick?

PROF. MARCUS: I don't see the $6.8 billion figure in your submission.

MR. JOYCE: I can I can get that to you. We have submitted that.

PROF. MARCUS: Is that the measure of pay outs by defendants, total cost of litigation, the finance --

MR. JOYCE: It's the cost of the advertising.

PROF. MARCUS: Okay, so --

MR. JOYCE: I'll get that to the Committee.

PROF. MARCUS: The specifics you offered us, Round-Up and to other case, don't look like they are readily going to add up to that much money. Is the advertising exceeding the amount of the pay outs?

MR. JOYCE: No. The $6.8 billion is total advertising.

PROF. MARCUS: Right.

MR. JOYCE: And so this is a subset of that advertising.

PROF. MARCUS: But this is litigation promotion advertising?

MR. JOYCE: Yes.

PROF. MARCUS: And but I'm asking if that's way up here and the pay outs are down here, it seems

backwards to me.

MR. JOYCE: No, I'm not referring to pay outs. I'm referring to --

PROF. MARCUS: No, no, I understand that. So in order to make that worth your while, you'd have to have more than $8 billion dollars worth of pay outs to spend almost $8 billion on advertising, right?

MR. JOYCE: Well, I'd have to -- we'd have to line those up. What I'm referring to are these external forces that are helping to generate the claimants, not the actual pay outs.

JUDGE JORDAN: Can I ask the question to --

CHAIR ROSENBERG: Judge Jordan and then Judge Bates.

JUDGE JORDAN: Yeah. This almost $7 billion, that's total, not on an annualized basis, but total over some period of time? Or are you saying --

MR. JOYCE: Yes. It was between --

JUDGE JORDAN: Over what period of time?

MR. JOYCE: 2017 to 2021.

JUDGE JORDAN: And I believe Professor Marcus' question that's mine, too, is there must have been more than $7 billion in pay outs over that period of time. Otherwise, we'd to say that the folks doing the advertising and running these businesses are

economically irrational, right?

MR. JOYCE: Well, the overall figure that I gave you referred to all litigation.

JUDGE JORDAN: Right, so the question is, in all litigation, all mass torts, all MDLs that you're concerned about, you're saying that the payout is in excess of $7 billion?

MR. JOYCE: Yes.

JUDGE JORDAN: Am I right about that?

MR. JOYCE: Well, I think we've seen definitely studies we've done, US Chamber of Commerce has done and others on the total cost of the civil justice system. We can share those with you. But you're --

JUDGE JORDAN: It can't just be the total cost of the civil justice system, we're talking about MDLs. Do you have -- maybe you don't have it. Do you have a number of what the total payout over that same period of time?

MR. JOYCE: I do not. But we could probably find some examples of some individual cases, such as the Xarelto case paid, I think it was $775 million.

JUDGE JORDAN: Whatever the figures are, I understand that that might relate to whether MDLs are a good idea, but connect it in some way, if you would,

to the specific proposals that are set forth in Rule 16.1. What does the size of the advertisement lead to in terms of what should be in 16.1? Or whether there should be a 16.1?

MR. JOYCE: Well, I think our perspective is that the advertising helps to generate an overall volume of more claimants. And our perspective is, as our friends at Lawyers for Civil Justice recommended, is that there be an effective and reasonable method by which we can judge individual cases -- individual cases within the MDL in same way if they were brought as an individual case.

CHAIR ROSENBERG: Judge Proctor?

JUDGE PROCTOR: Let me make sure I understand what you're saying and not saying. Obviously, these products that are being sued over are made known to consumers by advertisement, right?

MR. JOYCE: Yes.

JUDGE PROCTOR: And so there's not an improper -- it's not a, per se, improper purpose behind lawyer advertising. What you're saying, though, is that that is one of the factors that contributes to people signing up who really aren't injured and being signed up, even though they're not injured, for example?

MR. JOYCE: Yes, I think that's correct.
JUDGE PROCTOR: So that doesn't help us with the gross advertising dollars, but your point is, is the gross advertising dollars are indicative of how people end up in the system, even though they shouldn't -- you say they shouldn't be in the system?
MR. JOYCE: Or should be considered and evaluated at the front end the way they would be if they were bringing the case individually.
JUDGE PROCTOR: The opposite of a mass exodus. But the point is, is the average consumer doesn't know how to file a claim, even though they've been injured. Advertising, obviously, helps with that.
MR. JOYCE: Well, again --
JUDGE PROCTOR: Not to mention the fact the Supreme Court says you can do it.
MR. JOYCE: I'm sorry. The Supreme Court says you can do what?
JUDGE PROCTOR: Says you can do it, says lawyers can advertise.
MR. JOYCE: That's true. And I'm not here to suggest that they can't. What I am here to suggest is that the advertising helps to generate that overall claim number, which factors into the consideration

that your subcommittee highlighted with up to 50 percent, in some cases, perhaps not being meritorious, that don't belong, that that number gets higher and higher.

JUDGE PROCTOR: I understand. Thank you.

CHAIR ROSENBERG: Okay. Thank you so much.

MR. JOYCE: Thank you.

CHAIR ROSENBERG: And if we can hear now for Ms. Kole regarding 16.1.

MS. KOLE: Good afternoon. My name is Deirdre Kole, and I'm assistant general counsel at Johnson and Johnson. I'm responsible for the management and oversight of a number of our product liability litigations against our companies. Prior to joining Johnson and Johnson, I was a partner at the law firm Drinker Biddle and Reath, where my practice focused on representing pharmaceutical and medical device companies, including in mass torts and MDLs.

I join with the others and thanking the Committee for allowing me to speak today and in commending the Committee's efforts to bring much needed change to the rules governing MDLs. It's been a long and, I hope, productive day. So without revisiting all of today's discussions, I do want to echo the concerns of many that spoke earlier about the

unprecedented numbers of unsubstantiated claims that are clogging the courts and overwhelming the MDLs.

Many of you have inquired about the articulated concern with unsubstantiated claims. To that point, empirical data is often difficult to obtain about the extent to which deficient claims are being filed in mass tort MDLs. The researchers who have looked at this question tend to focus on how many claims in MDL have been adjudicated to be bogus. But because individual claims are not typically challenged in the MDL courts, there's not much to glean from that particular metric.

Rather, the evidence lies in the extent to which claims disappear when vetting actually begins. So, for example, in Vioxx, upwards of 40 percent of the claims disappeared when claimants were required to provide proof of product usage, such as a prescription and/or proof of product injury to participate in the settlement. Now, some of you might say, but you don't know why those cases disappeared at that point in time. But it stands to reason that if the claims only disappeared at point of settlement, that the claims never should have been filed in the first place.

Similarly, when a random sample of claimants in the 3M --

PROF. MARCUS: Can I interrupt? I'm sorry.

MS. KOLE: Yes, of course.

PROF. MARCUS: Why does that stand to reason?

MS. KOLE: Because at that point in time, the claims were going to be paid out, so only those who actually were able to come forward with proof of product usage and proof of injury would qualify for the settlement and get paid.

PROF. MARCUS: I'm not sure I'm following the logic, but go ahead.

MS. KOLE: Okay. Similarly, when a random sample of claimants in the 3M Combat Arms Earplug litigation were ordered to produce evidence to substantiate their claims, the vast majority could not, 126 out of 500 Wave 1 plaintiffs, so 25 percent, reportedly produced no evidence and dropped out of the case. And nearly three quarters had no record of ever using the product at issue.

Notably, in the MDL involving at Ethicon's pelvic mesh devices, 46,511 cases were filed against Ethicon which is a J&J company. Out of these cases 24,695, more than half, were ultimately dismissed for basic factual shortcomings or inability to establish a recognizable injury.

Another proponent of early gatekeeping along the lines of what Rule 11 requires -- as many of you know in many MDLs, the initial CMO typically suspends all pleadings, motions and discovery practice pending further order of the court. So there's no mechanism that guards against the filing or substantiating claims.

I think that something like an explicit reference to Rule 8, 9 and/or 11, could bolster in the MDL context and serve as a critical reminder that parties due process safeguards should still apply in the MDL context. For that reason, I believe that something along the lines of the (c)(4) amendment as suggested by LCJ, or language along the lines of how and when the parties will exchange information about the factual basis for their claims and defenses, including initial disclosures that demonstrate compliance with Rules 8, 9 and 11, to confirm that each case is properly before the MDL would help to aid in this effort.

CHAIR ROSENBERG: Thank you. What are your views on some of the earlier comments we heard, and you touched on it that you thought -- referenced 8, 9 and 11 would go a long way. One suggestion was making explicit what I would think would be implicit

as to the pleadings in an MDL, whether it's the master or the short form, or the two of them in conjunction, that they comply with all applicable rules, including but not limited to 8, 9 and I guess 11 is separate, but I mean do you think that would address what you're saying?

MS. KOLE: I think it would be a marked improvement than where we are right now. I think, right now, the MDL practice is very ad hoc and is subject to the preferences of the individual judge presiding over the MDL proceeding, to the extent that the rule could remind practitioners the rest of the rules of procedure actually still apply in these proceedings, that would be very helpful in guarding against some of these issues.

CHAIR ROSENBERG: And do you think there's confusion that people actually think they don't apply? Or is it we all know, they apply, but we need to remind people with that, whether it's lawyers and judges alike, or is there confusion as to whether they apply or not and whether 16.1 would somehow mean other rules don't apply?

MS. KOLE: I think, Your Honor, that many people believe MDLs are different, you know, there is a special place for MDLs because we don't do

individual motion practice in those cases. We don't look at each case on its individual merits. And because of the totality, we have to look at everything in this sort of conglomerate fashion that doesn't lend itself necessarily to how the original rules were designed and applied.

CHAIR ROSENBERG: Thus, the reminder would be helpful.

MS. KOLE: Yes.

CHAIR ROSENBERG: Okay. Joe, did you have a question? Did I see your hand reaching for the microphone?

MR. SELLERS: Sure. I think my question may have been superseded by your recommendation, which I think is a sound one, but I was a little questioning when you gave us some quotes about numbers and dismissal of claims. Some of these, I gather, might be claims that were dismissed after discovery or some other steps in the process, rather than claims that necessarily should never have been brought to begin with, that is that they didn't even -- with a little bit of due diligence, they would have never been brought?

MS. KOLE: I think that's true, but I also think that part of the problem we face is that cases

are filed, partly because of issues like the mass tort aggregators and lawyer advertising, that should not have been brought in the first place. And so why do the parties have to invest the time and effort, resources and money in going through discovery, in going through the PFS processing, in getting medical records? Because it's an undue burden on us for something that shouldn't have been filed in the first place.

MR. SELLERS: Right. But I assume, and I guess what I'm saying is, there may be and your reference to Rules 8, 9 and 11 might help encourage lawyers and aggregators and others to be engaged in more due diligence. There'll be some screening that would be warranted, it could be done at the outset. But there may be other ways in which some of these claims get dismissed because in the course of discovery, it's clear that they can't prove causation or they can't do something else that might not have been quite as clear at the time of filing. And that's partly what litigation and discovery is about.

MS. KOLE: Absolutely. I mean there's alternate causation. There's all sorts of other things that could --

MR. SELLERS: Right.

MS. KOLE: -- take place during discovery, but only for appropriate claims.

MR. SELLERS: Right. And I just want to make the distinction between those for which it ought to have been evident before filing that they shouldn't have been filed, as opposed to those that were filed, but eventually dismissed because they couldn't meet some evidentiary standard that only emerged in their failure in the course of discovery.

MS. KOLE: Right. We're on the same page.

CHAIR ROSENBERG: Ariana and then Judge Boal.

MS. TADLER: I just want to further pick up on that. And I think Joe and I are thinking about the same thing, perhaps. So isn't it the case, though, and in terms of some of these numbers that you've shared, that it might well be that you get to the point of settlement and perhaps there are -- there may be claimants who never -- they didn't have the product or the pharmaceutical or whatever -- but aren't there instances where there are specifics like product ID and those claimants simply are incapable of providing that information and for that reason, they are excluded?

I'm trying to understand the scope of the

figures so that we make sure that we understand, really, the applicability and not get lost in what are large numbers, but perhaps the numbers are not as large as being quoted because they might be including people who never purchased or never used or never had the device implemented versus causation issues, like Joe and you have just touched upon; also, there may be specifics that they simply cannot provide because they just don't have that information and they are excluded?

MS. KOLE: But isn't your point that they ultimately never should have filed?

MS. TADLER: Not necessarily, not necessarily.

MS. KOLE: Actually, I think that I have a follow on from these very, Ariana Tadler's (phonetic) question because if, and obviously, you know, the mesh cases much better than I do, but it may be that there are higher dismissal rates in the mesh cases because they were a device that was inserted surgically, as opposed to a prescription and a person may know that they had a mesh, but they didn't know which kind of mesh from or the product number for the mesh. So it's a little harder to get that information up front, especially if there are statue limitations issue. So

that may be why there's a higher percentage of those types of dismissals in the mesh cases.

MS. TADLER: That could be true, but in naming a defendant, shouldn't you know who the responsible party is? And if it's available in your medical records, shouldn't you do that due diligence on the front end?

MS. KOLE: Sometimes it's not always clear in the medical records, the product number -- I mean, that was true in that case I had, it was not what the device was.

CHAIR ROSENBERG: Rick?

PROF. MARCUS: On Page 4 of your submission, you say something -- well, one of the things we've heard today and before is cases in an MDL should be handled the same as case individual cases. The bottom of Page 4, you say what you think a rule should require is that within 30 days of being filed in MDL, the plaintiff must produce evidence, medical records, identifying the product, documenting the injury, and that if that doesn't happen, the MDL court must dismiss with prejudice and impose sanctions. Is that what happens in ordinary one-on-one cases?

MS. KOLE: I mean it's a Rule 11 requirement, though.

PROF. MARCUS: It is --

MS. KOLE: It's akin to --

PROF. MARCUS: Rule 11(c) says you can't do anything until you serve a motion, the other side gets 21 days to back off; the court may impose sanctions on finding a violation of the rule.

MS. KOLE: Right.

CHAIR ROSENBERG: And it's not the attorney's fees of the defendant, but something else.

MS. KOLE: No, I understand that, but I think part of what this proposal is designed to safeguard against is the deterrent effect for the pervasive practice of filing unsubstantiated claims. So to the extent that this would be required, this could be something along the lines of a Rule 26 disclosure, where at the outset of the litigation, you file your complaint, within 30 days, you provide proof of injury, proof of use of the product at issue. And then you get to pass go. If not, you shouldn't get to pass go and we shouldn't have to incur the cost of defending against meritless claims.

CHAIR ROSENBERG: Do you find that in MDLs, defense counsel wants to proceed with the initial disclosures under Rule 26 but someone is saying that shouldn't be, whether it's the judge or plaintiff's

counsel objecting to them? I mean, what does that look like, the discussions about initial disclosures?

MS. KOLE: So I think, as I mentioned earlier, typically the first CMO in an MDL, the judge orders that all discovery pleadings and motion practice shall be suspended until further order of the court. And then the parties meet with the judge; they have their Rule 16 conference or whatever the equivalent is in the current MDL context. And they talk about the issues that they want to go forward with and I think because everybody's so focused on getting to Bellwether trials, a lot of things fall by the wayside. So the focus becomes on plaintiff fact sheets and defense fact sheets, and how are we going to get to the trial pool? And how are we going to get the first case out there so that we can assess the merits of the litigation?

So the focus shifts from are there viable claims here to how are we going to get to the first Bellwether trial? That's been my experience, at least.

CHAIR ROSENBERG: But so I mean what is your position on initial disclosures? I mean are defense counsel part of the fact that it falls by the wayside? Do you affirmatively want those required disclosures

or is that consistent with how you think and MDL should be that you don't do that and you move forward with preparing for Bellwether and fact sheets?

MS. KOLE: In some MDLs, there has been an equivalent of this type of disclosure, like a plaintiff profile form, which requires certain biographical information about the plaintiff, who the surgeon was in a medical device case, and the proof of product you use and proof of -- for a qualifying injury or revision, perhaps. So they would have to provide that as akin to an initial disclosure. It's just typically a negotiated CMO that the judge can enter as opposed to something that's prescribed by the rules.

CHAIR ROSENBERG: Judge Proctor?

JUDGE PROCTOR: Yes. Thank you. And you're probably our last speaker from this perspective, so I just wanted to mention, you cited our agenda book from November 1, 2018. So I went back to look, just to review that again, because I was actually not on the -- in 2018, I was on the panel, not on this committee. And it seems to me, and this address is not just to you, but to the others remaining in the room that have already spoken, it seems to me that we have been struggling with this issue and known about this issue

for five years now.

We referenced all the problems, the get a name, make a claim problem; the aggregators angling for leadership problem; the aggregators wanting a seat at the table problem; the aggregators building up inventory for settlement purposes. We referenced the fact that sometimes people don't do due diligence on the claims that they file on behalf of clients, but there are product ID problems. Sometimes clients don't know which hip implant was put in them.

We talked about the difference between how easy it is to track down a prescription versus an over-the-counter purchase in terms of product use. I'm gonna butcher this, but Judge Dao (phonetic) and I think Judge St. Eve used to say there are three tests for a rule. Is there a problem? Is there a rules-based solution to the problem? And is there some law of unintended consequences that we need to be careful about?

To be clear, we know there's a problem. We understand there's a problem. Now, that doesn't mean we always -- it doesn't mean everybody agrees on the size of the problem and the problem shows up in every single products liability MDL, but I'm gonna to accept for purposes of our hearing today in hearing from you

that that is the case. Just so you understand, we're focused on is there a rules-based solution that doesn't create unintended consequences?

So I think we -- the lion's share of what we dealt with today is, is there a problem? I'm still searching for the right answers to is there a rules-based solution that doesn't create some unintended consequence for, not just the parties, but also the transferee judges who handle these cases. So I don't know if you wanted to respond to that, but I felt I've got to say it because we tested hard a few of the assertions made earlier today, but that was why. We were trying to figure out, okay, but what would a rule look like that would solve this problem?

MS. KOLE: And I'm glad we agree that there is a problem. And I do think that there is a rules-based solution in that if people vet their cases more proactively than they currently do and part of the problem is that because of how lawyer advertising is functioning, plaintiffs or claimants are signing up with multiple law firms. And both are filing on behalf of the clients. They don't know. We get to the end of the cases and we realize that there's multiple firms involved, and we don't know who the case belongs to. So there's a lot of unintended

consequences, I think, by virtue of the advertising itself.

Having said that, I do think that if we use or at least pay reference to the rules that already exist and try to apply them in this context, we can try to make a measured inroads into alleviating the problem that currently exists. As to unintended consequences, I'm not sure how applying Rule 11 or Rule 8 or Rule 9 would really impede claimants' rights.

CHAIR ROSENBERG: Judge Jordan?

JUDGE JORDAN: Following up on something the Judge Proctor has asked, and maybe I should have been asking this directly throughout the day, although I think a lot of the questions were going around this. For those who have been opposing Rule 16.1 as it's drafted, do you think that it's better than nothing? Or is it worse than nothing?

MS. KOLE: I think it's better than nothing.

JUDGE JORDAN: So 16.1, as drafted, you'd say, doesn't go far enough, but you wouldn't say this is actively going to do harm?

MS. KOLE: I don't think it's actively going to do harm. I think that, from my perspective, the chief problem that we face in MDLs are the number of

claims and if we can do more in (c)(4) to alleviate that we'll be better served.

JUDGE JORDAN: Okay. Understood, thanks.

CHAIR ROSENBERG: Judge Boal.

JUDGE BOAL: So I appreciate all the comments that we've had today, but I'd particularly like to thank you and the other corporate representative because I do find it helpful to hear from the parties, so thank you.

MS. KOLE: My pleasure. Thank you for having me.

CHAIR ROSENBERG: Thank you so much. Okay. Last, but by no means least, but by no means least, carrying the mantle for maybe the plaintiffs, we haven't as much from the plaintiff side as the defense side today, but Ms. O'Dell to address Rule 16.1.

MS. O'DELL: Thank you, Your Honor. Thank you all. Thank you for your efforts and for the opportunity to have a chance to speak to the rule. My name is Leigh O'Dell. I represent plaintiffs. I currently serve as co-lead counsel in the Johnson & Johnson talcum powder MDL. I have seen at the street level, if you will, a lot of these problems and relish the opportunity to talk with you. And I want to focus on the actual substance of the rule and the focus on

the initial conference and trying to set the stage for the initial conference once an MDL is created.

And first, I think there absolutely should be an initial case management conference, and I would go farther than the rule does to require that that happen. And then as to the topics themselves, and I want to focus on Subsection C, the report for the initial management conference, as described, should be more focused on preliminary matters. And as I appreciate those, it should be an opportunity for the parties to apprise the court of the factual basis of the claims, the legal issues, the status of the litigation in the federal courts and any orders that have been previously been entered prior to consolidation.

It also should be an opportunity for the parties to tell the federal court about what's been happening in state court litigation. It should be an opportunity to discuss whether there should be leadership appointed, the process and the timing.

I heard from my friend, Mr. Beisner this morning, my friend on the other side of the "v." I don't share his concerns about the appointment of plaintiff's counsel as leaders. In fact, I would commend to you, Professor Bradt and Professor Baker's

article on MDL myths and what they discuss in terms of the potential -- the lack of ethical concerns between leadership counsel and non-leadership counsel and how that is addressed. I think they absolutely nailed it as it's worked out over my 20 year career in MDLs.

I think limiting the report in the initial conference to the shortened list of topics reflected in proposed Rule 16.1(c)(1), (2), (3) and (11) focuses the court on the matters most important at the beginning of the case. These topics allow the court to become informed, but they do not require substantive decision making that will affect the direction of the MDL prior to the appointment of leadership.

I want to talk a little bit about leadership and coordinating counsel. Rule 16.1(b) suggests that the court may appoint coordinating counsel. I would urge the committee to delete this provision. There are no qualifications for this position. While there's not a requirement that this counsel be appointed, the fact that it's suggested in the rule means that more likely than not a coordinating counsel would be appointed. If appointed, there's no requirement that the coordinating counsel have knowledge of the case, have a stake in the litigation,

if you will, know the parties involved in order to be able to do that coordinating job effectively.

Should it be a neutral? Should it be a plaintiff's lawyer, if you're talking about coordinating the plaintiff side? There's so many open questions. We believe adding this step into the process would be inefficient. It's not necessary, and it's likely unproductive. And then when you think about leadership itself. And let me just speak to this because this primarily affects the plaintiff side, leadership appointments will affect the direction of the case, the theories that are pursued, the injuries that become a part of the MDL, the discovery, the scope.

Leadership is absolutely critical on the plaintiff side. And it's extremely important for lawyers who represent clients who've been injured, that leadership be appointed as quickly as possible. My colleagues on the other side of the "v.", they have a client that hires them, they have a strategic plan right away. They hit the ground running in the initial conference. Plaintiffs don't have that capacity. We find ourselves in a place where we're still trying to organize ourselves. We don't know who's going to be involved and who the players are

going to be.

And I would say moreover, coordinating counsel, despite their best efforts, if they had a report that touched on every topic in Subsection C, what would end up happening is the defendants have all their leadership in place, the plaintiffs do not and what's in that report very likely would prejudice the plaintiffs going forward, particularly if the leadership that's appointed does not agree with the points made in that initial report. I think that is very important.

And truly, my experience is most experienced counsel on both sides are able to come together, submit a report to the court without coordinating counsel. And I've found that to be true in every MDL that I've been a part of.

Now, let me talk about a few of the topics listed in 16.1(c) that I feel, frankly, are not ripe for consideration during the initial status conference. We've heard a lot today about claims and whether they're supported or unsupported, Subsection 4 and how parties should exchange information. Let me say from the plaintiff's perspective, I believe the rules apply equally in MDLs, including Rule 11 and those are requirements that we have as lawyers and

officers of the court. I believe that.

I believe there is a process that can be worked out where fact sheets or something similar to that can be instituted very soon after leadership is appointed in order for plaintiffs who file a claim to, in an appropriate time period, provide evidence. I believe that that is absolutely important, and that claims that are adjudicated should be claims that are supported with product ID or appropriate evidence or evidence of injury.

But it shouldn't be that to have a citizenship, you've got to have a green card at the first day you file a complaint. We heard that earlier and that should not be the case. Let me also say, as it applies to consolidated pleadings, and particularly master complaints and short form complaints, they work together to present the claims of an individual claimant. And we heard some discussion about the talcum powder MDL earlier, and since I happen to be very familiar with that, let me just point out a couple of things.

There is a 200-page master complaint with specificity as to fraud and every other aspect of the litigation, including the injury. And a talcum powder injury is defined as epithelial ovarian cancer, so if

an individual plaintiff on the shortform complaint checks she has a talcum powder injury, it means she has epithelial ovarian cancer, and obviously, she's going to have to put forward evidence of that injury as the time goes on.

CHAIR ROSENBERG: Can we just take a pause for just some questions? And then if you haven't had a chance to cover what else you wanted to say, we'll circle back.

I think just Judge Jordan had a question.

JUDGE JORDAN: Yes, I do you. Well, two. One of them is you said you were concerned about coordinating counsel, there's no authority for that, but then you are in favor of leadership counsel. Is there authority to appoint leadership counsel that's anymore grounded than the authority to appoint coordinating counsel?

MS. O'DELL: I may have misspoken, Your Honor, and not been clear. What I was saying is there's no criteria for that. There's no description in the rule of what would be intended? Who would be the appropriate person to fulfill that role? What would be the scope of the role? Would it be a neutral? Would it be one for defense and one for plaintiffs and what --

JUDGE JORDAN: But you're not relying on an authority or lack of authority?

MS. O'DELL: No, Your Honor. I just said it's not clear and from my perspective, I think what could occur is that you would end up having two rounds of appointments and all the ancillary activity that goes on in terms of leadership appointments, if you had a coordinating counsel for plaintiffs, for example, you would have a competitive process among lawyers for that. And then that individual, I'm assuming would be -- their job would end after the appointment of leadership and you'd have a second process, creating a lot of inefficiencies.

JUDGE JORDAN: Okay. And maybe more importantly, at some point in your presentation, you said, in effect, there shouldn't be early vetting or at least that's what it sounded like to me. That, you know, let this stuff come out later. But that isn't the way it works in one-on-one litigation. We don't say you can just file whatever you want and then down the road in discovery, we'll figure out whether your pleading was adequate or not.

There are rules about pleading. And so one of the things, of course, we've heard again, and again and again today is it is as if the rules were

suspended in MDS because people are coming to court -- they're not -- you know, and it may be that in a wonderful 100-page or 200-page master complaint, there's a definition of what a injury is. And by checking a box, somebody can say yeah, but they meant that because if you look on Page 87 of the complaint, that's what that meant. And surely that's what this person meant when they checked that and sent it into their lawyer. Maybe that happens in some cases, but we're hearing from a lot of these folks on the other side of the "v.", that there's just nothing resembling ordinary pleading, where somebody says in a mass tort case, I took the medicine or I used your product and I used it within the statute of limitations, and I got to injured, give me money.

There's nothing close to that. So are we are we getting the wrong information from them? Is it or do you have some different thing to tell us? I've heard a lot about give us the facts or the numbers. Do you have some facts or numbers that tell us this is kind of an unfounded concern that we've been hearing all day?

MS. O'DELL: I think there are two sort of topics within your question, Your Honor, if I could take them in turn. The first thing is the pleading,

the actual complaint itself and whether it's sufficient. And that's what I was speaking to in regard to a master complaint and the short form complaint, basically that Rule 7(a) pleading that begins the action. And in this context, where there's a master complaint for administrative purposes, it seems perfectly appropriate that a plaintiff should be able to have it. There should be an agreed upon form, and I can say in the talcum powder MDL, it was agreed upon, and a plaintiff could indicate the claims that she was asserting, as well as the injury. And there were definitions that were understood by the parties without any real confusion on that point.

There's a separate issue as it relates to facts supporting an individual claim, as they might be put forward in a plaintiff fact sheet process. I am for vetting of claims. I am for the appropriate timing. I do believe that 30 days is too short, but in most MDLs, you have to put forward a plaintiff fact sheet that has information about what you're asserting, including the specific injury and the medical records showing your injury. And if you have a pharmaceutical, for example, a proof of use document, like a pharmacy profile form, within 60 to 90 days. If you're unable to do that, and you can't

show cause why there's a good faith reason you can't do it, then that case should be addressed.

I would not -- I am not advocating that claims not be vetted. I've vet my own claims. That's something that we feel very strongly about. And I believe all lawyers should vet their claims. And I have said that publicly at seminars. I've said it to all the lawyers in the talcum powder MDL multiple times. So please don't understand me to say I'm not in favor of that. What I am in favor of is a fair process --

JUDGE JORDAN: I didn't misunderstand you and think you're saying let's all violate Rule 11. I did not --

MS. O'DELL: I know.

JUDGE JORDAN: I did not think that that's what was going on.

MS. O'DELL: Good.

JUDGE JORDAN: What I am trying to press a little bit on is there seems to be like a real chasm here with folks on the defense side saying over and over again, there is a dramatic number, not a few, but a very sizable percentage of these cases, which should never be brought. It's not, as Mr. Seller was saying earlier and Ms. Tadler was questioning that, it's not

that they had some adequate basis to start with and then in the course of discovery, you'd see it or they can't make a certain level of proof or something. It's just they never had a claim. They saw the number on the screen while they were watching a Matlock rerun. They called. All of a sudden, they're getting a cut of this, and there's some lawyer there who's only too happy to have a paralegal or a phone answering person, bring it in and say, I got another number, man, give me my money. And then that builds on itself.

And then it is a force that has momentum on its own. And that starts driving litigation. That's the theme or the story that we're getting to over and over and over again. And you are the last person today who's speaking from the other side, so I'm asking you to tell us something that would help us understand that the story about the avalanche, the little pebble that starts coming downhill and then it's more and more and more and now the boulders are falling and crushing justice underneath them, that that's just not -- we shouldn't be worried about that. That's much ado, if not about nothing, it's overblown.

Take the crack at it.

MS. O'DELL: Thank you for the opportunity.

I'd love to. I mean there are a number of issues at play in terms of the increase in the number of claims that are being put forward. Partially, it's because we have litigations recently that are dealing with consumer products, and they are used by millions of people, millions of people. So if you're talking about Round-Up, or talcum powder, or Zantac, for that matter, or other cases, then you've got millions of people have been exposed. If they those products cause injury, you're going to have a greater number of potential claimants. That's one thing.

Second thing as to claims not being vetted, I believe, it's that if a lawyer gets a claim that they have a duty to vet that claim prior to filing it, it is not a if somebody comes to my law firm, to give you a practical example, and they say Leigh, I believe I was injured by X product, my duty as a lawyer is to vet that case before I file it. I believe that is the right approach, even if somebody came to me because they were referred or a person who advertises sent that case to my firm, I still have a duty as a lawyer to be a lawyer and to substantiate that claim before filing.

Having said that, are there claims filed in MDLs that are not supported by your product use or

they don't have the right injury? I would not say, no, there are, but is it the problem that we've heard about today? I'm not sure that it is, very frankly. Are there reasons lawyers sometimes have to file a case before they're prepared fully? Yes, whether it be statute of limitations or other issues.

So I would just say, is it as -- you've gotten the full throated view today, and I appreciate everyone's perspective that they brought. I don't believe that actually is accurate from what I see, or is there some percentage, yes. Is it 30 percent? No. Is it 60 percent, which I heard earlier? Absolutely, no, I don't believe that to be the case.

CHAIR ROSENBERG: A few more questions. So we have Judge Bates, then Judge Proctor, then Rick and then we'll go from there.

JUDGE BATES: A little more specific follow-up on that, I understand part of your issue with respect to (c)(4), the early vetting, if you want to call it that, is that it's premature before there's a leadership counsel appointed. Tell us why you think it's premature to even have it as an issue of discussion at that initial conference, before leadership counsel is appointed?

MS. O'DELL: Thank you. The reason is this,

because leadership -- we don't even know who's going to be speaking on behalf of plaintiff, since its coordinating counsel or what their involvement in the litigation is. I do believe it's necessary to have knowledge of the case individually; what injuries are going to be within the scope of the MDL? What type of use is going to be required? What are the relevant tools in order to exchange information? That really should be something that is a part of the meet and confer process with the plaintiff steering committee and the defendant, not -- it could be mentioned, but in terms of the substance of it, I believe it must wait until after leadership. And if that's the case, why would you spend the court's time on it in the initial conference? You could mention it. It's got to be addressed and we all agree on that.

JUDGE JORDAN: That seems to be true of virtually every one of the matters listed, all 12 of them really would benefit or need someone to speak to them. So why isn't what you're saying that you can't do any of this until there's a leadership counsel?

MS. O'DELL: Your Honor, and I don't -- I'm not arguing that there shouldn't be any of this mentioned. In fact, I believe there are some very important things to mention. I think the court needs

to understand generally about the facts of the case and some of the legal issues. I think that can be done. I think that you can inform the court and apprise them of what's happened in federal court and state courts. I think you can talk about leadership, that's a fulsome conference.

But, for example, I don't think settlement is an appropriate topic for the initial status conference for many reasons, some of which I share the views of my friends on the defense side about that being too soon. Whether you refer matters to a magistrate judge or a special master, I think it's far too soon to understand what will be needed at that point in time. And so what I'm suggesting is that the rule essentially narrow the group of topics that I think are very important, set aside those that really should be addressed after leadership, maybe even put them in another subsection of the rule, but not make them a part of the initial conference because, frankly, the people that will be speaking at that time, if it's coordinating counsel, will really not have authority from the plaintiff's perspective.

JUDGE JORDAN: So effectively, you would take the list of 12 and reduce it down to a list of about four or five subjects?

MS. O'DELL: Correct.

JUDGE JORDAN: And eliminate a lot of these items that are listed?

MS. O'DELL: Or segregate the other issues to another subsection after leadership is appointed. I do think they're very important, all, it's just a matter of timing.

CHAIR ROSENBERG: Judge Proctor?

JUDGE PROCTOR: So the way we've drafted the proposed rule is that the parties are the meet and confer. And it strikes me that that may be the best opportunity for the transferee judge to hear from everyone on all these issues, because after appointment of -- there is going to be leadership counsel appointed after appointment of leadership, it's not necessarily all the communications, but probably substantially most of the communications to the court on behalf of the plaintiff side would be through leadership or steering committee members. And so we were concerned with, well what happens with everyone else who isn't in leadership? It seems to me that preparing a report for the conference gives all the parties a chance to weigh in.

And I think you referenced sometimes there's a difference in leadership about which theories to

pursue, how to sequence the litigation, all those things. If the court is waiting to hear those things from just a select -- the group the court selects, wouldn't that limit the court in terms of having a more fully orbed understanding of the different perspectives on the case?

MS. O'DELL: I think that the initial conference can be that opportunity, Judge Proctor, I agree. I think my pause and concern relates to coordinating counsel and sort of what that does, but the parties, I believe, could come together, create a report from the plaintiff's side and the defense side, and present that to the judge. And potentially they could hear -- the judge could hear from a number of parties on the plaintiff side and get a broader perspective. I would disagree with that.

JUDGE PROCTOR: Yeah. Perhaps we need to be more clear in maybe the commentary, I'd be interested to hear what my colleagues and friends on the Committee think. But the idea was, it's hard to hear -- we want to hear all the voices, but it's hard to hear in organized presentation of all the voices.

Not surprisingly, the focus of this entire day has been on pharmaceutical or other mass tort cases. I want everyone to bear in mind, we're trying

to draft a rule for all MDLs. We weren't tasked with being the products liability MDL subcommittee, we were tasked with being the MDL subcommittee. So when you have, for example, dueling patent cases that come in, it probably makes sense to have them walk through these issues and perhaps, the more that are unique to patent litigation.

If we have an antitrust case that rolls in and there's, for example, in my situation, 90-some odd class actions filed around the country challenging the same or some Venn diagram of the same practices, how do you fashion a rule that lets the transferee court get a head start hearing from the parties and designing a litigation plan that's going to advance the Rule 1 purposes of the MDL?

So that's just my final thought is, I think we've been really focusing on, obviously, what is the largest number of cases on the MDL docket, but not the largest number of MDLs on the docket.

MS. O'DELL: Understood, Judge. Thank you.

CHAIR ROSENBERG: Did you have a question?

PROF. MARCUS: Well, I think I want to follow up or say something along the lines that Judge Jordan was addressing. And we have heard repeatedly, and we asked for specifics about ill-founded,

unfounded, inappropriate, call it what you will claims that show up seemingly in large volume, just in absolute numbers, not perhaps as percentages. And also, just a personal note, I've never used Round-Up or Zantac to the best of my knowledge, but I've received several automated robo calls asking me if I have and telling me to push number one to speak to someone. So I've done that and I've gotten a person and I asked is this a law firm. And no, it isn't. We're a referral agency.

Something we heard a long time ago, but haven't heard as much more recently, but maybe had discussed today is I thought some on the plaintiff side actually thought that getting the chaff out of the way early on would be beneficial to those with valid claims. And I'm wondering is the plaintiff side resistant to some kind of minimal showing up front?

I don't think it necessarily has to adopt Rule 11 and take an off with your head approach, but is the plaintiff side really that reluctant? Are they all resistant to this sort of inquiry because I would think somebody who does what you do might be upset that somebody else waltzes in with 1,000 alleged claims that are just cluttering the landscape of your MDL.

MS. O'DELL: You know, when you ask a question to speak for all plaintiffs lawyers for all times, there's no real right perspective on that.

PROF. MARCUS: Yes, I understand.

MS. O'DELL: I don't know what some of my brothers or sisters would say about that issue. I will say for myself and what I believe to be the general consensus is that plaintiff's lawyers are not against an appropriate vetting of claims at an appropriate time. And I'm not saying years, I'm just saying not the day you file your case. I mean we're talking a matter of degree, there's not an -- there is not a firm belief that that's somehow improper.

That's appropriate. That's how cases are put forward. I will say there are concerns on the plaintiff side that relate to a process. It's onerous and really sucks the life out of the leadership team. I think secondly, there's concern on the plaintiff side that sometimes when it does come down to the settlement process, that there is an approach that deals with claim averages, and so they are concerned about only having pristine claims and somehow being disadvantaged at the settlement process.

I don't necessarily share that view, but I think it requires discipline on the defense side to

only pay claims that are actually viable claims. And so, to answer your question, Professor, I mean, there isn't resistance on the plaintiff side to the concept or to it being early in the case, what we are resistant to is something that's so onerous in terms of timing and the amount of material that would need to be put forward.

CHAIR ROSENBERG: Judge Boal and then Ariana.

JUDGE BOAL: I had a question about your comment that Section 12 should be eliminated and that's the part that talks about whether matter should be referred to magistrate judge or a master. I know some of the written submissions took issue with a master at this stage, but my question is focused on the reference to a magistrate judge. And I'm wondering why you think it might not be helpful at this stage for a reminder to both the parties and even the district judge, that use of a magistrate judge might be an efficient use in preliminary matters to expedite and help the parties resolve case issues?

MS. O'DELL: I agree that magistrates are extremely helpful. And so I wasn't commenting that that aspect of the proposed rule should be eliminated. What I was suggesting is it might not be right for

discussion in the initial conference, but that as to -- as it reads whether matters should be referred and what matters, it not might not be -- the litigation might not be mature enough to understand what those matters are and when they should be referred.

That was my only comment. I definitely believe magistrates play a huge role and I appreciate all that they do to make the litigation reform.

MS. TADLER: So Ms. O'Dell, I'm going to pick up on Judge Proctor's last round with you when he was talking about the extent to which perhaps, given the fact that we use the word parties in that initial conference, do you have any thoughts, concerns about whether that initial conference might somehow go off the rails or become a bit of some chaos with lots of people popping up?

Do you have any concern about that? Or is it your sense that at that point in time before leadership is appointed, that's an appropriate time if somebody is representing clients, they should be heard?

MS. O'DELL: There's always concern that something could go off the rails, particularly at that early stage, but I do think it's an opportunity, particularly for those who are going to be in

leadership, those that are investing in their time and their energies or resources into a litigation, that they'll be a part of a process to, at least on the plaintiff side, make that as coordinated as possible. It certainly could. I think if I weighed my concerns, I have a little greater concern in and having a competition for coordinating counsel at the beginning of a case. And if it -- what my position is, I'd rather take that, put that to the side, let plaintiff's lawyers organize themselves for that presentation to the court. And it's in everyone's best interest that that be an appropriate, cogent presentation.

So I'd rather have that situation than have a situation where you've got coordinating counsel that's going to be appointed by the court and, all of a sudden, you have another sort of leadership competition round.

MS. TADLER: Thank you.

CHAIR ROSENBERG: Any more questions?

Andrew?

PROF. BRADT: Just to circle back on Judge Jordan's initial line of questioning and your discussion about fears the coordinating counsel might unfairly or inappropriately bind leadership. That

sounds somewhat similar to what we heard from your friend on the other side of the "v.", Mr. Beisner, earlier today about leadership counsel with respect to individually appointed attorneys. And so I wonder if you could speak to his argument about the potential problems with leadership counsel and why those are -- the arguments made coordinating counsel don't apply to leadership?

MS. O'DELL: You know, as I heard Mr. Beisner's argument, what I heard him saying is leadership does set the direction of the litigation; leadership does bind the party, the plaintiffs, if you will, on the direction. And he has a concern about that from an ethical standpoint. I don't share that concern because just because leadership is appointed and you have a plaintiff steering committee or a co-lead counsel, doesn't mean you refuse to listen to counsel that are not appointed to leadership. I spend a tremendous amount of my time having forums for non-leadership counsel to hear from them so they can have input into the process.

They're invited to do work if they would like to, it's not just the plaintiff's steering committee. So I don't have that concern. I do think it's incumbent on leadership in carrying out their

duties in an effective way, to create a process where that happens, that we're communicating sort of outbound communication, but we're also hearing from them and we're also inviting them in. I think that's critical and that's why I'm not as concerned about what Mr. Beisner had to say.

CHAIR ROSENBERG: Joe?

MR. SELLERS: Since you were talking about leadership counsel, let me ask a different kind of question. I assume you heard earlier today, I think it was, again, Mr. Beisner's questions about the extent to which the appointment of leadership counsel might encroach on the relationships of the counsel for representing individual members of the of the MDL. Are there steps that are normally taken to address that, protect against it or is that a common problem?

MS. O'DELL: I don't view leadership as impinging on non-leadership counsel in their fundamental duties to their individual clients. I don't see that at all, you're still required to comply with all the court's orders. You still are responsible for recommending to your client, whether they -- for example, in terms of settlement, whether they accept a settlement or not, I mean there's not an interference with that individual client's lawyer and

their duty, and there shouldn't be.

Once a settlement is either accepted or rejected, it's up to the individual counsel to take the necessary steps for that client, so that's not something that I find to be a concern. And, frankly, it's sort of in the papers for this meeting was sort of a new concern, as I read about it. That's not something that I've seen be a problem.

MR. SELLERS: So would you agree that one of the prerogatives of a court in and appointing leadership counsel might be to establish the boundaries of the responsibilities of the leadership counsel visa vie the individual client claimant counsel?

MS. O'DELL: I think the court often does that with the appointment order as to what the role is of leadership and what it's not, I think that's often very well defined. And it's focused on those common issues where you get economies of scale and efficiency, whether it be discovery, whether it be experts, whether it be some of the briefing that is involved. And very frankly, I think that if an individual lawyer representing clients is invited into the process, and you have leadership doing their job appropriately, it really works quite well and they're

happy to have some lawyers, particularly, some lawyers that are very skilled at certain areas, and they may not have that skill. And so it's a good synergistic relationship if it works correctly.

CHAIR ROSENBERG: Judge Lauck?

JUDGE LAUCK: So I don't want you to take time to answer this question if I'm only asking it because I'm a neophyte, we can speak later. I want to understand what the role of leadership counsel is now with respect to vetting cases. So what we're hearing from the other side is that we can get nine months into this or two years into it or five years into it, and we have these meritless cases. And what I hear you saying is that we just need a reasonable amount of time, so the other side is suggesting 30 days. You mentioned 30 or 60 or 90 days. And a gentleman speaking about a case earlier said they had a monthly status conference, during which they went through several cases and got rid of them.

So if folks know exactly how this works, I'd like to know, but is it part of the role of leadership counsel to get rid of those cases?

MS. O'DELL: It's not to get rid of them, but it's a great question. I mean what the focus of leadership counsel should be on discovering the case,

not only the liability, but there are aspects of liability discovery that impact on the causation case, what is a claim that should be put forward as part of the criteria of the of the MDL? And so these things are inextricably intertwined in many instances. And so leadership has the role of doing that discovery, particularly as it relates to causation. When we think about vetting, I'm thinking about causation, and then also developing experts for the general causation case that will really be bringing that evidence for the overall MDL.

And so, from my perspective, our leadership group, we had that responsibility. We did those activities. We came to a conclusion about what was supported by the science and the liability in the particular case that I'm involved in --

JUDGE LAUCK: Can I interrupt you just a second because --

MS. O'DELL: Can I just say one really quick -- no, please, I'm sorry, Your Honor.

JUDGE LAUCK: You can finish about causation later. I understand the issue of causation. That is a longer term concern. What I'm talking about getting rid of obviously wouldn't be those cases that require some kind of discussion. I'm talking about the cases

that these folks are complaining about where they say they never had the prescription. They never took the drug and that isn't a causation issue. That's just a basic factual pleading foundation.

MS. O'DELL: Understood.

JUDGE LAUCK: And so that's what I'm trying to ask you about.

MS. O'DELL: I'm sorry. I misunderstood. And that issue of whether they've used the product or they've been prescribed the drug, from a leadership standpoint, all I can do or other leaders can do is say this is what's required, you must have used this product, and there may be many products involved, and you must have this proof to establish it. That's the best I can do. And I have to communicate that loudly and often. And then it's incumbent upon that lawyer to work with their clients to establish that proof.

I'm sorry, I went to another place, but it's equally important in the vetting process. And that is, what's your injury? You know, there could be numerous injuries alleged, and, at some point, the leadership has to put forward what are the experts going to support? These injuries. And then that, it seems to me beyond that, if you had an injury that didn't fit within that criteria, then what would need

to happen is that individual lawyer would need to put up an expert to support that case, or there'd need to be a process for that case to be dismissed.

PROF. MARCUS: That would not mean it's a groundless case, it's just there's been learning since the case was filled.

MS. O'DELL: Absolutely not. There could be things learned in discovery, new science that's published. That's a totally different case. I just would be remiss if I didn't say this before I sat down, too, there was a lot of discussion about you can't find the client. You can't talk with them. You know, I represent ovarian cancer victims, and very frankly, a lot of my clients have died. Sometimes I might be able to reach them for a little while.

There are a lot of very valid, credible reasons that there might be a breakdown in communications. And then, frankly, there are reasons that can't be justified, but you cannot put everything in the same bucket. And I think that's important.

CHAIR ROSENBERG: Thank you so much, Ms. O'Dell.

MS. O'DELL: Thank you, Judge.

CHAIR ROSENBERG: You fielded a lot of questions, so --

MS. O'DELL: Thank you. My pleasure. Thank you.

CHAIR ROSENBERG: Thank you. So a couple of obvious points. We're not 3:30, at the adjournment time, just in case anyone hasn't checked their watch, it's 4:30. But I think we did pretty well, nevertheless, even though we skimped on lunch.

But this has been incredibly valuable. Now I know I asked a couple of you in the beginning whether you were going to still be here. It didn't mean we wanted to call you back up, but I did confer with a couple of our committee members and there may be a question or two that we do have. I am going to ask Mr. Dahl to come back up. That is the only person I have identified. I'd reiterate that Mr. Dahl, in his work on behalf of the LCJ, was referenced repeatedly by many, many, many other witnesses. And so that likely is one reason why he is being called back up now and he also came in the very beginning. So I think there is a question or two directed to him that we'd just like to conclude with.

So thank you for staying around, Mr. Dahl, for the duration of the day, as with all of the others. We so appreciate it. So Mr. Dahl, if you could come forward, and I'm just going to open it up.

I'll begin with Judge Jordan, if you have a question that wasn't previously asked, so we can hear that from Mr. Dahl. And then if anybody else has a question, please let me know.

JUDGE JORDAN: Thanks. I'm going to ask you the better than nothing or worse than nothing question. As drafted, not as though you would have it in your ideal world, but as drafted, is Rule 16.1 -- well, A, is it a rule? Because you seem to have expressed some disagreement with that, and B, whether it's a rule or not, is it better than nothing? Or would you rather see nothing than this, on behalf of the LCJ?

MR. DAHL: Thank you, Judge. I appreciate the question and it's a little difficult to answer, but I'd say at very least, it's a close call. I think that as written, the utility, particularly on the unvetted claim problem, is not where it needs to be and that some of the discussion -- in particular, some of the discussion in the notes is more likely to cause confusion than to clarify.

JUDGE JORDAN: But I'm going to push you, right? I'm asking you, like if you say I just can't answer it, I'll accept that. But this is like an on-off switch, not a rheostat. If it was up to you,

would you say look, this isn't what I want, but it's better than nothing and I can build on it? Or would you say this is actually going to cause more trouble than it's going to be a benefit? We shouldn't do this at all and it should be back to the drawing board completely or forget it, just do best practices?

MR. DAHL: Oh, I thought I was going to be to answer until you changed the question like that. If it's a stark question of something or nothing, I just think that's different. I very much believe that there needs to be further definition in the rules. And that the committee should go forward and write better rule and it's very important to do that. But if you asked me today --

JUDGE JORDAN: Yes, go ahead. If you're getting to the yes or no, that's what I'm waiting for.

MR. DAHL: All right. I mean I didn't want you to push me like this, but since you did, I would probably say no, that as written, it's not going to provide more clarity than problems.

CHAIR ROSENBERG: Any other questions? I'll just ask one question. I asked it of a couple of the witnesses, the addition to the notes -- well, no, let me ask the question first. Do you think that there is confusion in the bar as to whether the rules of

procedure apply in MDLs?

MR. DAHL: Yes.

CHAIR ROSENBERG: There's confusion?

MR. DAHL: Yes.

CHAIR ROSENBERG: Some people think they don't apply? I'm not saying that they actually -- what happens in practice, but is there actually confusion as to whether Rule 8 applies to what you do in a Rule 12 in an MDL?

MR. DAHL: Yes. And I think that, you know, I didn't invent the phrase MDL exception, I heard that. And I think people have used it. And I think there is some sense that MDLs are so much different, that the rules don't apply. But let me give this a huge asterisk. If pushed, probably people would say the rules do apply, but what we're trying to engage with and where we think the Committee is in solving this problem, there are some rules that work in non-MDL cases that don't seem to be working in MDL cases.

Why is that? What is the difference? And can there be a different rule definition or rule framework that brings those same principles that already exist in the rules for other cases into the MDL context? That's the basis of our proposals, particularly on the claims efficiency issue.

CHAIR ROSENBERG: Do you think that some of the comments that Mr. Halperin made about adding to the notes to make clear that -- I think he was the one and some of the others that Rule 8, and this was also raised, I think, by others, but that that Rule 8 applies, that Rule 9(b) applies, that Rule 11 applies. In other words, whether it's the master or the short form or the combination of the two, does that -- would that help? Would that clarify that the rules of procedure are alive and well and they apply? And oh, by the way, so does Rule 12 and motions to dismiss, to make clear what maybe some think is not clear?

MR. DAHL: Yes.

CHAIR ROSENBERG: Would that help in terms of that gate-keeping, that sending the message out to those potential frivolous filers, beware, don't file if you don't have a Rule 8 claim?

MR. DAHL: Yes.

CHAIR ROSENBERG: Would that send a message to the defense that you've got that Rule 12 capability to seek dismissal?

MR. DAHL: Yes. I think all of that would be very helpful.

CHAIR ROSENBERG: So with that modification

to a note, hypothetically, would you answer Judge Jordan's question differently?

MR. DAHL: Yes. The reason I didn't want to answer directly is that I think that there is a lot of good things in the rule, in the draft, and that it can be easily edited to change my answer and to be a rule that provides much more clarity than unintended consequences. And that is a very important principle that I think would help a great deal.

CHAIR ROSENBERG: Thank you. Any other questions? Okay. Thank you, Mr. Dahl. We appreciate you coming back up.

Well, on behalf of all of us, and for those of you who have stayed with us throughout the day, and those of you who are appearing remotely and anyone else who will ultimately read the transcript and read the next agenda book where some of this will be published, as you know, we have two more sets of hearings, but this was the first. And, as of right now, this was the only one scheduled in-person.

So this was highly important for us, and I want all of you to know how much we appreciate the time that you put in, just as all of us put in time, time away from what we do day-to-day, so have you, not just appearing here today, but all of the comments

that you have submitted. But not just the comments for today because most of you have been meeting with us for five years. So we really appreciate it, and to the extent that any question appeared as if we weren't listening, or we were pushing back, or minds were made up, that is absolutely not the case.

We're just all so invested in this and we want to get it right. And so it's a collaborative process that we couldn't do without you. So thank you for helping us start this notice and comment period off on such a -- what I think is a successful note, a helpful note, and we really appreciate it. So I think without anything further, that does conclude our hearing for today.

(Whereupon, at 4:40 p.m., the meeting in the above-entitled matter was adjourned.)

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REPORTER'S CERTIFICATE

DOCKET NO.: N/A

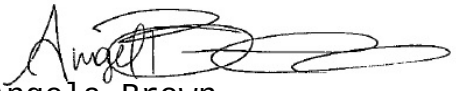
CASE TITLE: Proposed Amendments to the Federal Rules of Civil Procedure

HEARING DATE: October 16, 2023

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Administrative Office of the U.S. Courts.

Date: October 30, 2023



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